Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland

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RIGHT-TO-FARM LAWS: BREAKING NEW GROUND IN THE PRESERVATION OF FARMLAND†

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I. INTRODUCTION: THE PROBLEMS OF FARMLAND CONVERSION

The law of the majority of jurisdictions in the United States has been modified in the last four years to provide farmers with a defense against nuisance actions resulting from changed conditions in the locality. These statutes, generally termed "right-to-farm laws," vary considerably in many particulars, but share the common goal of encouraging farmers to continue devoting their land to agricultural purposes. The impetus for this widespread policy choice is recognition of the fact that a serious effort must be made to prevent the destruction of America's agricultural base.

Approximately three million acres of American farmland are converted to non-agricultural uses each year.[1] Although agricultural land has been changed regularly to other more intensive uses since the first European settlers set foot on this continent, the diversion of this nation's land resources away from agriculture only recently has been perceived as a problem.[2]

Americans traditionally perceived land as available in unlimited quantities,[3] even after the official closing of the western frontier

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1. Of the three million acres converted, approximately 675,000 acres had been used as pasture land, 825,000 acres were forest and 875,000 acres had other land uses. Approximately 70% of the land was changed to urban or transportation uses and 30% was utilized for man-made reservoirs and water impounding facilities. National Agricultural Lands Study, Final Report 35 (1981) (hereinafter cited as "NALS"). The National Agricultural Lands Study was jointly sponsored by the United States Department of Agriculture and the President's Council on Environmental Quality to study "the availability of the nation's agricultural lands, the extent and causes of their conversion to other uses, and ways in which these lands might be retained for agricultural purposes." *Id.* at 4.

2. *Id.* at 4; U.S. Council on Environmental Quality—1978, Ninth Annual Report on Environmental Quality 269-270 (1978) [hereinafter cited as "CEQ Report"]; Antham, *Vanishing Acres*, Des Moines Register, (reprint of seven articles appearing July 8-13 and July 15, 1979); McCann, *Prime U.S. Farmland is Going . . ., Going . . .*, Detroit News, Aug. 3, 1980, at 1A col. 5.

3. This is not true of Native Americans who historically do not view land as a commodity to be consumed.

in 1886.[4] During the half century that followed the First World War, this attitude was reinforced by a continuing substantial surplus of agricultural products.[5] The surplus was made possible, despite substantial population growth and widespread conversion of farmland, by the development of new technologies which allowed greater productivity from the land remaining in production.[6] This situation, and the public's perception of it, began to change in the early 1970's, when the demand for agricultural products increased abruptly as a result of a complex series of domestic and foreign developments.[7] Although the demand has recently dissipated to a degree sufficient to create substantial current surpluses,[8] national concern over the dangers of irreversibly removing large quantities of land from food production has continued.[9]

The increase in demand in the 1970's coincided almost exactly with substantial changes in population patterns. Not only did the move from the city to the suburbs which began after World War II continue to accelerate,[10] but people began to migrate to rural areas. Over forty percent of the homes built during this decade were constructed on rural land and often were scattered throughout the

4. *See* F. J. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920). This is the date assigned by Turner. *Id.* at 9.

5. Timmons, *Agricultural Land Retention and Conversion Issues: An Introduction*, in FARMLAND, FOOD AND THE FUTURE 1 (M. Schnepf ed. 1979).

6. The developments in technology included synthetic organic pesticides, new seed varieties, more sophisticated machinery and improved fertilizers. NALS, *supra* note 1, at 24. Technology has also made it possible for more people to work in cities while living in rural areas. The prime example of this is the automobile, which, combined with the construction in the 1950's and 1960's of high-speed limited access highways, made vast quantities of rural land accessible to metropolitan areas. In addition, innovations such as radio and television, along with the electricity to run them, have minimized the isolation of living in rural locations. Coughlin, *Agricultural Land Conversion in the Urban Fringe*, in FARMLAND, FOOD AND THE FUTURE 31 (M. Schnepf ed. 1979); *see also*, Frelich and Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW 27, 28-29 (1981).

7. NALS, *supra* note 1, at 24. Timmons, *supra* note 5, at 1. The domestic and foreign developments include increased population both in the United States and throughout the world, greater demand from developing and communist countries, and greater reliance by the United States upon agricultural exports to reduce the country's balance of payments problem generated by imports of petroleum and manufactured products.

8. Detroit Free Press, Jan. 23, 1983, at 20, col. 1; Birnbaum, *Farm Economy, Depressed by Surplus, Isn't Expected to Perk Up Much in 1983*, Wall St. J., Dec. 9, 1982, at 52, col. 1; Minsky, *Abundant Grain Harvests Causing Big Storage Problems for Farmers*, Wall St. J., Sept. 27, 1982, at 19, col. 3.

9. *E.g.*, Lee, *U.S. Farming Practices: Food for Thought*, Wall St. J., Jan. 12, 1982, at 28, col. 3.

10. NALS, *supra* note 1, at 43.

countryside on relatively large lots.[11]

The effect upon agricultural capacity of these population shifts was intensified by the fact that the most productive land often was affected disproportionately by such shifts in population.[12] For example, many American cities were founded along major land and water transportation routes which generally bisected fertile river or coastal flood plains. The cities often began as trading and market centers for the surrounding agricultural region[13] upon which they now encroach. The result is that approximately one million acres of the land annually converted to development uses is the most productive land, termed prime farmland.[14]

The massive conversion of farmland to other uses[15] is not the result of explicit government policy but merely the sum of the decisions of numerous individual farmers to sell their land for development. These decisions represent the aggregation of a number of factors. Perhaps the most compelling of these is the willingness of a buyer, due to population pressures, to pay a high price for the land.[16] This high sales price is balanced against other economic

11. The NALS has projected that between 1977 and 1995 approximately 12 million new households will be added to non-metropolitan areas. *Id.* at 45.

12. Of the nation's 100 counties which rank at the top in value in the production of farm products, 33 are the central counties of metropolitan areas. *Id.* at 43.

13. CEQ Report, *supra* note 2, at 269; Coughlin, *supra* note 6, at 29.

14. The United States Department of Agriculture has defined prime farmland as:

> [L]and that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oil-seed crops, and is also available for these uses (the land could be cropland, pasture-land, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops * * *. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season * * * and few or no rocks. * * * Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding.

General Accounting Office Report to the Congress: *Preserving America's Farmland—A Goal the Federal Government Should Support* 1-2 (Sept. 20, 1979) [hereinafter cited as "GAO Report"] (quoting with approval the Department of Agriculture's Soil Conservation Service). *See generally*, Johnson, *Identifying Prime Food and Fiber Lands*, in LAND USE: TOUGH CHOICES IN TODAY'S WORLD 105-113 (1977). To a limited extent non-prime farmland can be converted to cropland production from other uses such as pasturage or forest use. Often, however, such conversion requires substantial additional inputs of energy and/or water, both increasingly scarce resources. GAO Report, *supra* at 14-21.

15. This conversion is not universally viewed as a serious problem. *See* Brown, *Agricultural Land Use: A Population Distribution Perspective*, in FARMLAND, FOOD AND THE FUTURE 77-79 (M. Schnepf ed. 1979).

16. The price differential is often very substantial. For example, the average cost per acre for the purchase of development rights (the difference between the value of the land for agricul-

considerations, such as selling prices of the farmer's commodities, transportation and energy costs, assessed property taxes, and state and federal inheritance taxes imposed at death.[17] The decision to sell is also influenced by a number of personal considerations, such as the farmer's age and health; his/her wish to retire, farm elsewhere, or follow another career; and the presence of children who may or may not wish to continue farming.[18] Both the economic and the personal aspects of the decision to sell can be influenced by secondary factors and land use conflicts. These include both nuisances created by nearby urban residents such as litter dumped in fields (which gets caught in and breaks expensive machinery), trespassers, vandalism, theft of produce, increased traffic on farm roads[19] and complaints by these same residents about the use of fertilizer, herbicides and pesticides and about the creation of odors, noise and dust.[20] When these complaints by urban neighbors crystalize into a lawsuit against the farmer, the financial cost of defending the suit, with no certainty of success, and the unpleasantness of the whole situation can weigh strongly in favor of selling the property.[21] Even when the conflict does not reach the stage of litigation, a farmer's perception that his/her farm might be declared a nuisance, and result in an order by a court to cease operation, contributes to the "impermanence syndrome." This syndrome is characterized by a

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ture and for development), as of autumn, 1982 was $1,848 per acre. R.E. COUGHLIN, J.C. KEENE, J. ESSEKS, W. TONER, AND L. ROSENBERGER, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 163 (1981) [hereinafter cited as COUGHLIN AND KEENE]. For a discussion of purchase of development rights programs, see text accompanying notes 45-46.

17. REGIONAL SCIENCE RESEARCH INSTITUTE, UNTAXING OPEN SPACE: AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE 49-56 (1976) [hereinafter cited as UNTAXING OPEN SPACE]; Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621, 621-24 (1980); Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119, 120-22 (1979) [hereinafter cited as *Governmental Policies*].

18. *Governmental Policies*, *supra* note 17, at 120-22.

19. *See*, *e.g.*, Jennings v. Farmers Mutual Insurance Association, 260 Iowa 279, 149 N.W.2d 298 (1967) (farmer's cows died from drinking from open cans of paint placed near a pasture fence); Fontenot v. Ludeau, 309 So.2d 772 (La. Ct. App. 1975) (unknown trespasser scattered seed rice treated with insecticide resulting in the death of five animals); Stottlemeyer v. Crampton, 235 Md. 138, 200 A.2d 644 (1964) (nuisance suit against farmer for driving cattle down highway).

20. *Id. See generally*, E. THOMPSON, JR., FARMING IN THE SHADOW OF SUBURBIA: CASE STUDIES IN AGRICULTURAL LAND USE CONFLICT (1980).

21. *See* Gavin, *Farmers Want to Protect "Rights,"* Lansing State Journal, Feb. 9, 1981, at B3 col. 2; Swickard, *Sweet Smell of Farm Success is An Ill Wind to Neighbors*, Detroit Free Press, Apr. 12, 1981, at 3A, col. 1; Pollard, *Do Farmers Need a Right to Farm Law?*, Mich. Farmer, Apr. 5, 1980 at 32, col. 2.

disinclination on the part of a farmer to invest in farm buildings or equipment because of a belief that he or she is unlikely to be farming on that property over the long term.[22]

Increased awareness of the broad impact of these decisions by individual farmers to sell their properties has influenced state and local governments to experiment with a variety of programs designed to protect agricultural land.[23] The first, and most widely adopted, approach used to encourage farmers to continue farming is the implementation of various forms of tax relief.[24] Adopted by forty-eight states as of 1981,[25] these measures generally provide for

22. COUGHLIN AND KEENE, *supra* note 16, at 34-35; W.W. FLETCHER & C.E. LITTLE, THE AMERICAN CROPLAND CRISIS 81 (1982). The sense of impermanence is often based upon the incorrect belief of the farmer that his land will be developed since much more land is affected than is likely to be actually developed. FLETCHER & LITTLE, *supra* at 81.

23. *See generally* B. DAVIES & J. BELDEN, A SURVEY OF STATE PROGRAMS TO PRESERVE FARMLANDS (Nat'l Conf. of State Legislatures, Washington, D.C., 1979); NALS, *supra* note 1, at 64; Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 448-70 (1982).

Although federal projects and policies often have a significant effect on the rate of farmland conversions, federal initiatives to protect agricultural land have been generally limited in scope. The NALS has identified four federal initiatives designed to foster the protection of agricultural land: (1) formulation of administration-wide policies to encourage agricultural land protection, (2) agency-wide policies (only USDA and EPA have explicit policies), (3) field-level actions—programs adopted by individual EPA regional offices and Farm Home Administration state directors, and (4) the Tax Reform Act of 1976 designed to soften the impact of estate taxes on farm families. NALS, *supra* note 1, at 75-77. The Farmland Protection Policy Act, 7 U.S.C.A. §§ 4201-09 (Supp. 1982), passed by Congress in 1981, provides that farmland is a "unique natural resource," 7 U.S.C.A. § 4201(a)(1) (Supp. 1982), which must be protected, and instructs federal agencies to take into acount the adverse effects their activities may have upon the nation's farmland. 7 U.S.C.A. § 4202(b) (Supp. 1982). Because of its newness, the impact of this Act has not been determined.

24. The first program of this kind was initiated by the state of Maryland in 1956, but most activity in the area occurred in the 1970's. *See generally* GAO Report, *supra* note 14, at 23-31.

25. NALS, *supra* note 1, at 67. COUGHLIN AND KEENE, *supra* note 16, at 18. Georgia has no tax relief program. Kansas has amended its constitution to permit differential assessment but, as of 1981, had enacted no statutory program. COUGHLIN AND KEENE, *supra* note 16, at 56 n.1. The literature on preferential taxation is vast. *See* Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands*, 15 GONZ. L. REV. 675, 692-95 (1980). *See generally* ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, REP. NO. 256, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (1974); UNTAXING OPEN SPACE, *supra* note 18; Alden and Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination*, 42 S. CAL. L. REV. 59 (1969); Coughlin, Berry & Plaut, *Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention*, 31 NAT'L TAX J. 165 (1978); Dean, *The California Land Conservation Act of 1965 and the Fight to Save Agricultural Lands*, 30 HASTINGS L.J. 1859 (1979); Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D.L. REV. 548 (1975); Henke, *Preferential Property Tax Treatment for Farmland*, 53 OR. L. REV. 117 (1974); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*,

property tax assessments based upon the current use of the land for farming rather than upon its fair market value. Although some states have minimal eligibility requirements and provide no penalty for conversion of the land to other uses, the majority of states merely defer the payment of taxes so that an owner who later converts the land to an ineligible use must then pay all or a portion of the taxes abated earlier.[26] A few states require as a condition for differential assessment that the farmer enter into an enforceable agreement to restrict the land to agricultural uses.[27] Two states have adopted "circuit breaker" programs which, rather than assessing the land differently, provide a credit against the farmer's state income tax based primarily upon the percentage of household income consumed by property taxes.[28]

Despite their popularity, these tax incentive programs alone cannot discourage farmland conversion effectively. In some instances these laws may delay conversion for a few years, but they often only postpone the sale until the farmer retires or dies.[29] Nevertheless, when combined with other features of a comprehensive program, they do encourage the individual farmer who wishes to resist the allure of the developer's dollar.[30]

Recognizing that the source of many problems leading to farmland conversion is the mixing of agricultural and urban uses, states and localities have adopted two approaches to separate the two activities. The first approach, termed agricultural districting, involves the designation of a specific area for a long-term agricultural use.

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42 MO. L. REV. 369 (1977); Mix, *Restricted Use Assessment in California: Can It Fulfill Its Objectives?*, 11 SANTA CLARA L. REV. 259 (1971); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 U. KAN. L. REV. 215 (1977); Comment, *Preferential Assessment of Agricultural Property in South Dakota*, 22 S.D.L. REV. 632 (1977); Comment, *Preferential Property Tax Treatment of Farmland and Open Space Under Michigan Law*, 8 U. MICH. J.L. REFORM 428 (1975); Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. ON LEGIS. 158 (1970); Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600 (1965).

26. NALS, *supra* note 1, at 67.

27. *Id.* at 68.

28. The two circuit breaker states are Michigan and Wisconsin. *Id.*

29. NALS, *supra* note 1, at 69. *See generally* GAO Report, *supra* note 14, at 23-28; UNTAXING OPEN SPACE, *supra* note 17, at 77-79. *But see* Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975); Delogu, *The Taxing Power as a Land Use Control Device*, 45 DEN. L.J. 279 (1968); Farr, *The Property Tax as an Instrument for Economic and Social Change*, 9 URB. LAW 447 (1977); Heller, *The Theory of Property Taxation and Land Use Restrictions*, 1974 WIS. L. REV. 751; Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80 (1970).

30. NALS, *supra* note 1, at 67-70.

The formation of such a district generally is initiated by the local farmers and then approved by governmental agencies.[31] Once approved, the designation continues for a fixed but renewable period, usually six to ten years. Inclusion in an agricultural district is dependent upon the landowner's written permission (except in certain parts of the New York program).[32] Benefits to a farmer who enrolls in such a district include protection against special assessments for improvements such as water and sewer extensions, and protection against the condemnation of the property by the state. Although these districts can provide farmers with a greater sense of security, and, like the tax incentives, mitigate some of the factors which encourage a farmer to sell, to date they have not been very effective in preventing farmland conversion.[33]

The second approach designed to separate urban and farm uses is agricultural zoning, which designates in a legally binding way the purposes for which land may be used. The majority of the 270 state and local jurisdictions that have adopted this approach allow some non-farm uses within the protected area.[34] These non-exclusive zones often attempt to protect farmland by requiring large lot sizes ranging from ten to 160 acres.[35] Other ordinances use a quarter/quarter zone (also termed area base allocation zone) approach, under which a landowner is entitled to develop residential lots based upon ownership of a set number of acres (often one lot to a quarter of a quarter section of land (forty acres)). Thus the owner of a forty acre parcel is entitled to one lot, while the owner of an eighty acre parcel would be entitled to two lots. Once these lots are developed or sold, the landowner has no further zoning entitlement to development.[36] A variation upon this scheme is a sliding-scale zone which allocates rights to build housing based upon the size of the parcel the farmer owns, with the number of dwellings per acre decreasing as the size of the parcel increases.[37] In either case, lot sizes

31. *Id.* at 65; B. DAVIES & J. BELDEN, *supra* note 23, at 39. For a more detailed discussion of this approach, see SULLIVAN, AGRICULTURAL DISTRICTS: THE NEW YORK EXPERIENCE IN FARMLAND PRESERVATION IN LAND USE: TOUGH CHOICES IN TODAY'S WORLD 112-30 (1979); Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655 (1980); Meyers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1 (1979).

32. NALS, *supra* note 1, at 65.

33. *Id.* at 65-66.

34. W. TONER, ZONING TO PROTECT FARMING—A CITIZEN'S GUIDEBOOK 25 (NALS 1981).

35. *Id.* at 26.

36. *Id.*

37. *Id.* at 27.

are relatively small, usually one to three acres, so that non-farm homes often can be clustered thereby leaving large areas of contiguous land for farming.[38] The effectiveness of these ordinances is limited by the fact that if political pressure results in the setting of population densities at too high a level, the program may allow the land to be subdivided into unproductive small parcels. In addition, these ordinances do little to mitigate potential conflicts between allowed non-farm residents and the farmer.[39]

These two weaknesses can be overcome by the adoption of exclusive agricultural zoning,[40] which prohibits all non-farm uses (including residences) within the designated agricultural zone. The very effectiveness of this sort of zoning has limited its popular support, however, and exclusive zoning has been adopted by relatively few communities.[41]

A third approach used in a limited number of jurisdictions is the separation of development rights from the fee interest in the property. Under a purchase of development rights (PDR) program, the government, in effect, acquires an easement for the development of the property. The value of the development right is defined as "the difference between the market value of the land and its value solely for agricultural purposes."[42] The primary drawback of this sort of program is the fact that its cost can be very substantial.[43]

A related strategy, one which is often combined with restrictive zoning, involves the transfer of development rights (TDR). Under this plan, certain portions of the locality are designated as agricultural districts and others are deemed development districts. Within the latter, residential development is limited to a specific density.

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38. *Id.* at 26.

39. *Id.* at 27.

40. *See generally* N. WILLIAMS, 5 AMERICAN LAND PLANNING LAW 322 (1975). Such ordinances have been held not to be "takings" since a reasonable use for the land remains. Cole v. Board of Zoning Appeals for Marion Twp., 39 Ohio App. 2d 177, 180-81, 317 N.E.2d 65, 68-69 (1973); Joyce v. City of Portland, 24 Or. App. 689, 546 P.2d 1100 (1976).

41. W. TONER, *supra* note 37, at 28; NALS, *supra* note 1, at 66.

42. NALS, *supra* note 1, at 66. As of 1981, such programs had been adopted in nine jurisdictions—four states, four counties and one municipality. *Id.* at 64. *See generally* COUGHLIN AND KEENE, *supra* note 16, at 148-73; Newton & Boast, *Preservation by Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVTL. L. 189 (1978); Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DE PAUL L. REV. 447 (1977); Roe, *Innovative Techniques to Preserve Rural Land Reserves*, 5 ENVTL. AFF. 419, 429-37 (1976); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 51 U. DET. J. URB. L. 461 (1974).

43. GAO Report, *supra* note 14, at 31; NALS, *supra* note 1, at 66.

Owners in the agricultural district are allocated development rights which may be sold to a developer and transferred to the development area, permitting construction in a greater density than was previously allowed.[44] Although such programs do allow the farmer to recoup some of the added value of his/her land without ceasing to farm, and therefore in individual instances have kept land in agricultural production, overall TDR's have been of limited success because of the lack of market demand for development rights. In addition, where participation is voluntary, parcels from which rights have been transferred often are not contiguous, thus leaving the farmer subject to all of the land use conflicts discussed above.[45]

II. DEALING WITH CONFLICTING USES: RIGHT-TO-FARM LAWS

Developing the political support sufficient to ensure enactment of any of the programs discussed above can be time consuming. Meanwhile, those individuals who choose to continue farming often become involved in unpleasant conflicts with their non-farming neighbors over the activities necessary to continue their operations. Recognizing the fact that none of the approaches above deals directly with the immediate problem of conflicts between such individuals, forty-seven states, as of December, 1983, had adopted "right-to-farm laws"[46] in order to protect farmers and ranchers from

44. GAO Report, *supra* note 14, at 31. The TDR concept was originally developed as a means of preserving urban landmarks, but has been applied to rural lands. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974); Rose, *supra* note 47; Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973).

45. GAO Report, *supra* note 14, at 32-34. *See also* COUGHLIN AND KEENE, *supra* note 17, at 177-79.

46. ALA. CODE § 6-5-127 (Supp. 1982); ARIZ. REV. STAT. ANN. §§ 3-1051, 3-1061 (Supp. 1981-1982); ARK. STAT. ANN. § 34-120-126 (Supp. 1981); CAL. CIV. CODE § 3482.5 (West Supp. 1982); COLO. REV. STAT. §§ 35-3.5-101-103 (Cum. Supp. 1982); 1981 Conn. Acts 226 (Reg. Sess.); DEL. CODE ANN. tit. 3, § 1401 (Supp. 1982); FLA. STAT. ANN. § 823.14 (West Supp. 1982); GA. CODE ANN. § 41-1-7 (1982); HAWAII REV. STAT. §§ 165-1-4 (Supp. 1982); IDAHO CODE §§ 22-4501-04 (Supp. 1982); ILL. ANN. STAT. ch. 5, §§ 1101-05 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 34-1-52-4 (Burns Supp. 1983); IOWA CODE ANN. §§ 172D.1-.4 (West Supp. 1982-1983); KAN. STAT. ANN. § 2-3201 (1982); KY. REV. STAT. ANN. § 413.072 (Baldwin Cum. Supp. 1983); LA. REV. STAT. ANN. § 51.1202 (West Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (Supp. 1982); ME. REV. STAT. ANN. tit. 17, § 2805 (Supp. 1982-1983); MASS. GEN. LAWS ANN. ch. 111, § 125A (West Supp. 1982); MICH. COMP. LAWS ANN. §§ 286.471-.474 (Supp. 1982-1983); MINN. STAT. § 561.19 (Cum. Supp. 1983); MISS. CODE ANN. § 95-3-29 (Supp. 1982); MO. ANN. STAT. § 537.295 (Vernon Supp. 1983); MONT. CODE ANN. § 27-30-101(3) (1981); NEB. REV. STAT. 81-1506 (Supp. 1981); N.H. REV. STAT. ANN. §§ 430-c:1-c:4 (Supp. 1981); 1983 N.J. Sess. Law

nuisance suits.

A. The Key Elements of Right-to-Farm Laws

Most of the states that have adopted right-to-farm statutes have done so since 1979,[47] as the result of an informal dissemination of the concept by various groups interested in agriculture.[48] There is no uniform model, therefore, to which the statutes of most states conform. Nevertheless, certain issues surrounding the concept have been addressed by virtually every legislature enacting such laws.

The Georgia statute[49] presents these basic issues in an unadorned form. Its entire operative provision states:

> No agricultural or farming operation, place, establishment, or facility, or any of its appurtenances, or the operation thereof, shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such agricultural or farming operation, place, establishment, or facility if such agricultural or farming operation, place, establishment, or facility has been in operation for one

Serv. 190 (West), to be codified at N.J. STAT. ANN. § 4:1C-26; N.M. STAT. ANN. §§ 47-9-1-3 (Supp. 1983); N.Y. PUB. HEALTH LAW § 1300-c (McKinney Supp. 1982-1983); N.C. GEN. STAT. §§ 106-700 (Supp. 1981); N.D. CENT. CODE §§ 42-04-01-05 (Supp. 1981); OHIO REV. CODE ANN. § 3704.01 (Page Cum. Supp. 1982); OKLA. STAT. ANN. tit. 2, § 9-210 (West 1938); OKLA. STAT. ANN. tit. 50, § 1.1 (West Supp. 1981-1982); OR. REV. STAT. §§ 30.930-.945 (1981); 3 PA. CONS. STAT. ANN. §§ 951-57 (Supp. 1983); R.I. GEN. LAWS §§ 2-23-1-7 (Michie Cum. Supp. 1983); S.C. CODE ANN. §§ 46-45-10-50 (Law Co-op Supp. 1981); TENN. CODE ANN. §§ 48-18-101-104 (Supp. 1981); TEX. AGRIC. CODE ANN. § 251.001-.005 (Vernon 1982); UTAH CODE ANN. § 78-38-5-8 (Supp. 1981); VT. STAT. ANN. tit. 12, § 5751-53 (Supp. 1981-1982); VA. CODE § 3.1-22.28-29 (Supp. 1981); WASH. REV. CODE ANN. §§ 7.48.300-.310, 70.94, 90.48 (Supp. 1982); W. VA. CODE §§ 19-19-1-5 (Michie Cum. Supp. 1983); WIS. STAT. ANN. §§ 814.04(9), 823.08 (West Cum. Supp. 1983-84); WYO. STAT. § 11-44-102 (1977). *See generally* Grossman and Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95; Comment, *The Arizona Agricultural Nuisance Protection Act*, 3 ARIZ. ST. L.J. 689 (1982); Comment, *"Right to Farm" Statutes—the Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U.L. REV. 415 (1982); Note, *The Right to Farm in Oregon*, 18 WILLAMETTE L.J. 153 (1982).

47. Statutes providing general protection for agriculture against nuisance suits were passed on March 26, 1979 in Washington and North Carolina, and later that same year in Alabama, Florida and Massachusetts. During 1980, statutes were adopted in Delaware, Georgia, Kentucky, Mississippi, Oklahoma and South Carolina. The remaining statutes have been passed in the short time since 1980. More limited statutes focusing only on feedlots were passed in Nebraska (1980) and earlier in Wyoming (1977) and Iowa (1976). Earlier feedlot statutes passed in Kansas (1963) and Oklahoma (1969) do not incorporate the priority of use concept shown in their later versions. KAN. STAT. ANN. §§ 47-1501-1510 (1981), OKLA. STAT. ANN. tit. 2 §§ 9-201-212 (1981).

48. Telephone interview with Shepard Quate, Associate Director, National American Farm Bureau Federation (March 12, 1982).

49. GA. CODE ANN. § 41-1-7 (1982).

year or more.[50]

This rather skeletal statute contains two key elements:

1. The modification of the common law of public and private nuisance,[51] and
2. The adoption of the defendant's prior use[52] (often for a set period of time)[53] and changed conditions in the locality[54] as the bases for the modification.

Several important issues are left unaddressed by this elemental statute: the impact of the statute upon actions alleging negligent action; standards of conduct, if any, required of a defendant seeking protection; the relationship of these laws to other statutes; and problems raised by the expansion of existing operations. Before examining these overlooked issues, however, the implications of the two key elements require analysis.

B. Modification of the Common Law of Nuisance

1. The Common Law Doctrine

Since the essence of the right-to-farm laws is a modification of the common law doctrine of nuisance, any analysis of these laws should begin with an examination of that concept. The term nuisance traditionally is applied to two diverse legal concepts.[55] A public nuisance is "an unreasonable interference with a right common to the general public."[56] Historically, the term public nuisance covered an array of minor criminal offenses[57] that ranged from interference with public health (maintenance of a hogpen), to public safety

50. *Id.* at § 41-1-7(a). The operative portion of the statute is introduced by a rather detailed statement of policy. *Id.* at § 41-1-7(b). *See* text accompanying note 85.

51. Most statutes provide or at least imply a defense against both public and private nuisance suits. *See, e.g.*, ALA. CODE § 6-5-127 (Supp. 1982); ME. REV. STAT. ANN. tit. 17, § 2805 (Supp. 1982-1983); N.C. GEN. STAT. § 106-700 (Supp. 1981); N.D. CENT. CODE § 42-04-02 (Supp. 1981); UTAH CODE ANN. § 78-38-5 (Supp. 1981). See Comment, *The Arizona Agricultural Nuisance Act*, 1982 ARIZ. ST. L.J. 689, 708-10, for a discussion of the failure of the Arizona statute to protect farmers from public nuisance actions.

52. *See infra* note 106 and accompanying text.

53. The requirement that a defendant's use must have become a nuisance as a result of changed conditions occurs in a number of statutes. *See infra* note 106.

54. *See infra* note 97 and accompanying text.

55. For an historical discussion of the differing origins of the two concepts, see McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

56. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1977).

57. *Id.* at § 821B comment b; *see* W. PROSSER, THE LAW OF TORTS § 88, at 583-85 (4th ed. 1971) and the cases cited therein.

(storage of explosives), public morals (maintenance of a house of prostitution), public peace (loud noises), and public comfort (noises).

Thus, the offenses did not necessarily involve any interference with the use or enjoyment of land. Under the Restatement (Second) of Torts, the determination of whether a particular interference is unreasonable and hence a public nuisance, is based upon whether: (1) the interference is "significant," or (2) it involves conduct which is prohibited by a statute, ordinance or administrative regulation, or (3) the "actor knows or has reason to know" that the conduct is either continuing or producing a permanent or long-lasting effect upon the public.[58] Traditionally, public nuisance actions could be brought only by public officials,[59] or by a private individual whose injury from the interference was different in kind from that of the public at large.[60] Recently, however, there has been a movement toward allowing individuals to maintain an action to abate a public nuisance as representatives of the general public, in a citizens' action or as members of a class in a class action.[61]

Private nuisance is a much narrower concept than public nuisance./The Restatement (Second) defines private nuisance as "a nontrespassory invasion of another's interest in the private use or enjoyment of land."[62] Thus, it involves an invasion not only of the

58. RESTATEMENT (SECOND) OF TORTS § 821B(2) (1977).

59. *Id.* at § 821C comment a.

60. PROSSER, *supra* note 57, at 586.

61. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1977). *See also* Bryson and MacBeth, *Public Nuisance, The Restatement (Second) of Torts and Environmental Law*, 2 ECOLOGY L.Q. at 256 (1972). *See generally id.* at 250-64.

62. RESTATEMENT (SECOND) OF TORTS § 821D (1977). A nuisance may be accompanied by a trespass (an unauthorized entry upon the land of another, PROSSER, *supra* note 57, § 13, at 63), but they are different concepts in that they protect different interests. The doctrine of trespass protects a plaintiff's interest in the exclusive possession of land, an interest breached only by physical entry. In contrast, nuisance law protects a plaintiff's use and enjoyment of that land, an interest which can be breached without physical entry. In many instances, one type of conduct interferes with both types of interests. PROSSER, *supra* note 57, § 89, at 594-95; RESTATEMENT (SECOND) OF TORTS § 821D comment e (1977).

See generally, Keeton, *Trespass, Nuisance and Strict Liability*, 59 COLUM. L. REV. 457, 464-70 (1959). The distinction has been somewhat blurred in the minority of jurisdictions that allow recovery in trespass for invasion by airborne particles. *See* Borland v. Sanders Lead Co., Inc., 369 So.2d 523 (Ala. 1979); (damages from airborne lead particles); Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960) (damages by settling of fluoride compounds); *contra*, Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280, 282 (1982) (noise alone cannot constitute a trespass). *See generally* Annot., 2 A.L.R. 4th 1054 (1980).

right to the physical integrity of the property itself, but also of the right to use that property in reasonable physical comfort.[63] These rights are not absolute, but are balanced by the right of the defendant to use his/her own property.[64] This limitation is formulated by the Restatement as:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[65]

Accordingly, an unintentional action invading an interest in land is judged by the same concepts of negligence,[66] recklessness[67] and conduct considered abnormally dangerous,[68] that would be used to evaluate the invasion of any other protected interest.[69] Negligence, then, is only one type of activity that may result in a defendant's liability for a private nuisance.[70]

In fact, most nuisances result not from unintentional but from intentional actions. In any community where individuals use land

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63. PROSSER, *supra* note 57, § 89, at 591.

64. Prosser states:

> The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his property that he causes no unreasonable harm to plaintiff. The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both.

PROSSER, *supra* note 57, § 89 at 596.

65. RESTATEMENT (SECOND) OF TORTS § 822 (1977).

66. RESTATEMENT (SECOND) OF TORTS §§ 281-328d (1965).

67. *Id.* § 500.

68. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977); *see* Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

69. The fact that the interference is with the use and enjoyment of land is obviously an important factor in the application of these rules to a particular factual situation. RESTATEMENT (SECOND) OF TORTS § 822 comment b (1977).

70. The relationship between nuisance and negligence has been confusing and troublesome over the years. Nuisance is a field of tort liability, designating a particular type of interest which is invaded and the injury inflicted. Negligence is one type of conduct which may lead to such an invasion. PROSSER, *supra* note 57, § 87, at 574. Thus, proof of negligence is not a prerequisite to a finding of liability as a nuisance. *See* Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953). The impact of this distinction on the scope of the Georgia statute is discussed below in the text accompanying notes 111-15. Unfortunately for clarity and convenience of analysis, no label analogous to the term negligence has been developed to designate intentional invasion of another's interest as a type of conduct rather than as a field of liability. RESTATEMENT (SECOND) OF TORTS § 822 comment c (1977).

in proximity to one another, there inevitably will be clashes between various individuals' proposed uses. Liability of one party to the other for these clashes "is imposed only in those cases in which the harm or risk to one is greater than they should be required to bear under the circumstances,"[71] that is, when the invasion is unreasonable.[72]

This issue of reasonable use is the key question in most litigation involving nuisances. The trier of fact balances the value of the two conflicting uses in light of all the circumstances of the particular case. Numerous factors are inserted into the weighing process, and no single factor is consistently found determinative.[73] Factors considered include the type, extent, and duration of the interference; the social value attached to the conduct of the plaintiff and the defendant; the practicability of either party preventing or avoiding the harm; and the appropriateness in the locality of either party's use of the land.[74]

Often, the nature of the locality in which the conflict occurs is decisive. Thus, a plaintiff who chooses to reside in a manufacturing district cannot complain of the discomfort caused by industrial activities; a factory that is located in the same manufacturing district is

71. RESTATEMENT (SECOND) OF TORTS § 822 comment g (1977).

72. RESTATEMENT (SECOND) OF TORTS § 826 (1977) provides:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

73. PROSSER, *supra* note 57, § 87, at 581, and cases cited therein.

74. The RESTATEMENT (SECOND) OF TORTS, in §§ 827 and 828 (1977) groups these key factors as follows:

§ 827. In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) the extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

§ 828. In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) the social value that the law attaches to the primary purpose of the conduct;

(b) the suitability of the conduct to the character of the locality; and

(c) the impracticability of preventing or avoiding the invasion.

See also PROSSER, *supra* note 57, § 89, at 596-602.

not a nuisance, but the factory may become one if it is constructed in a residential area.[75] Consequently, courts frequently must determine what is in fact the paramount use of a particular locality.

The advent of zoning often has led courts to defer to legislative decisions that define the uses appropriate to a particular area.[76] The character of a neighborhood can change, however, and when it does so, appropriate uses within its boundaries may change as well. Thus, a factory which was not a nuisance when it initially was established in open country might become one if a residential area develops nearby.[77] Moreover, at common law, the fact that the nature of the neighborhood changed only after the offending use had begun is treated often as essentially irrelevant.[78]

Although a defendant theoretically can acquire a prescriptive easement on the surrounding property to continue a nuisance, it is, as a practical matter, very difficult to do so, since the defendant's use must have been an actionable interference during the entire statutory period.[79] Thus, in the case of a factory built in open country, the statute would not begin to run until there was sufficient development in the locality to make the activity a nuisance. Even if the

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75. PROSSER, *supra* note 57, § 89, at 600.

76. *Id.* at 601. *See* Bove v. Donner-Hanna Coke Co., 236 A.D. 37, 258 N.Y.S. 229 (N.Y. App. Div. 1932).

77. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding an ordinance prohibiting operation of a brickyard in a residential area that developed after the brickyard was established); Yaffe v. Ft. Smith, 178 Ark. 406, 10 S.W.2d 886 (1928); Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933); Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963); People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890); Campbell v. Seamen, 63 N.Y. 568 (1876); *see* Levitin, *Change of Neighborhood in Nuisance Cases*, 13 CLEVE.-MAR. L. REV. 340 (1964); Annot., 42 A.L.R.3d 345, 364 (1972).

78. Ashbrook v. Commonwealth, 64 Ky. (1 Bush) 139 (1867); Boehm v. Philadelphia, 59 Pa. Super. 441 (1915). In some instances courts have stated explicitly that defendants should have foreseen that the area would not remain appropriate for their use. McClung v. Louisville & N.R. Co., 255 Ala. 302, 51 So. 2d 371 (1951); Beam v. Birmingham Slag Co., 243 Ala. 313, 10 So. 2d 162 (1942).

79. RESTATEMENT OF PROPERTY § 451 comment a (1944); PROSSER, *supra* note 57, § 91, at 611 n.40 and cases cited therein; see Curry v. Farmers Livestock Market, 343 S.W.2d 134, 137 (Ky. 1961), Matthews v. Stillwater Gas & Electric Light Co., 63 Minn. 493, 65 N.W. 947 (1896); Campbell v. Seaman, 63 N.Y. 568 (1896); Annot., 152 A.L.R. 343, 352-54 (1944). For cases finding that defendant had acquired a prescriptive easement, see Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944); Prijatel v. Sifco Industries, Inc., 47 Ohio Misc. 31, 36 (Ct. C.P. Cuyahoga County 1974).

The right to maintain a public nuisance cannot be secured by prescription. Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678, 680 (1933); People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890); *see* Cook, *Legal Analysis of the Law of Prescriptive Easements*, 15 S. CAL. L. REV. 47, 49 n.14 (1941).

plaintiff purchased his/her property long after the defendant's activities commenced, and therefore acted with full notice of the defendant's use of his/her property, the fact that plaintiff "came to the nuisance" is not an absolute defense to a nuisance suit, but at most one factor which a court may weigh in determining whether or not the defendant's use is reasonable.[80] Although courts generally hold that a defendant cannot, in effect, condemn a servitude to continue the nuisance on a neighbor's property without paying for it[81] (except by prescription for the statutory period), in specific instances courts have found that prior use, in conjunction with other factors, is sufficient to bar a plaintiff's action.[82]

This system of balancing, intrinsic to traditional nuisance litigation, allows the trier of fact broad discretion in weighing the many factors which determine the relative merits of two conflicting uses of land. In addition, this manner of dealing with land use conflicts gives the trier of fact maximum flexibility in tailoring the plaintiff's remedy, if any, to the circumstances present in the particular community where the conflict arose. Thus, a court may favor a coal mine over a neighboring house,[83] or a residence over a nearby piggery.[84]

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80. The RESTATEMENT (SECOND) OF TORTS § 840D (1977) provides: "The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable." Prosser agrees that coming to the nuisance is only one factor to be considered and notes that it is "clearly not the most important one . . . ." PROSSER, *supra* note 57, § 91, at 611. *See* McQuade v. Tucson Tiller Apartments Ltd., 25 Ariz. App. 12, 543 P.2d 150 (1975); Hall v. Budde, 293 Ky. 436, 169 S.W.2d 33, 167 A.L.R. 1361 (1943); Benton v. Kernan, 127 N.J. Eq. 434, 13 A.2d 825 (1940), *modified*, 130 N.J. Eq. 193, 21 A.2d 755 (1941); Siviglia v. Spinelli, 190 Misc. 690, 75 N.Y.S.2d 120 (1947); Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 264 Or. 577, 505 P.2d 919 (1973); Captain Soma Boat Line, Inc. v. Wisconsin Dells, 79 Wis. 2d 10, 255 N.W.2d 441 (1977); Abdella v. Smith, 34 Wis. 2d 393, 149 N.W.2d 537 (1967). *See generally* Note, *Present Day Rules Reminiscent of the Theory of "Coming to the Nuisance,"* 17 TEMP. L.Q. 449 (1953); Annot., 42 A.L.R.3d 344 (1972).

81. Yaffe v. Ft. Smith, 178 Ark. 406, 10 S.W.2d 886 (1928); Krebs v. Hermann, 90 Colo. 61, 6 P.2d 907 (1931); Campbell v. Seaman, 63 N.Y. 568 (1876). *See* Richards v. Ohio River R. Co., 56 W. Va. 592, 49 S.E. 385 (1904).

82. Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958); Fernandez v. Esdorn Lumber Corp., 50 N.Y.S.2d 904 (1944); East St. John's Shingle Co. v. Portland, 195 Or. 505, 246 P.2d 554 (1952); Powell v. Superior Portland Cement Co., 15 Wash. 2d 14, 129 P.2d 536 (1942); *see* Note, *Torts-Nuisance "Coming to the Nuisance,"* 32 OR. L. REV. 264 (1963) (analysis of East St. John's Shingle Co. v. Portland, 195 Or. 505, 246 P.2d 554 (1952)).

83. Versailles Borough v. McKeesport Coal & Coke Co., 83 Pitt. Legal J. 379 (1935) *reprinted in* R.B. STEWART AND J.E. KRIER, ENVIRONMENTAL LAW AND POLICY 147 (2d ed. 1978).

84. Hall v. Budde, 293 Ky. 436, 169 S.W.2d 33 (1943).

2. *The Importance of Priority*

The advantage of flexibility in the common law nuisance system is tempered by the lack of predictability inherent in such a broad balancing test. Neither plaintiffs nor defendants can make investment decisions with respect to their land with any certainty that their decisions will be protected by a court. A dairy farmer who needs a new milking machine may hesitate to purchase one because his whole operation may be enjoined as a result of a nuisance action brought by the owner of a bungalow on the edge of his land. Conversely, a potential purchaser of the bungalow cannot be certain that a court will protect her against the odors and flies from cow manure generated by the dairy operation; her rights under nuisance law are limited to having the court balance her use against that of the farmer.

In enacting the right-to-farm laws, the various state legislatures have made the policy judgment that the social benefits of retaining land in agriculture are so critical that, rather than allowing courts to decide on a case-by-case basis whether an agricultural use is reasonable, the balance between agriculture and other uses should always be tipped toward agriculture. This policy choice is made explicit in a number of state statutes.[85] The formulation in the Georgia statute is typical:

> It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When non-agricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this law [§§ 72-107, 72-108] to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.[86]

This explicit statement of the rationale behind the statute is impor-

85. *See, e.g.*, ARK. STAT. ANN. § 34-120 (Supp. 1981); IDAHO CODE § 22-4501 (Supp. 1982); ILL. ANN. STAT. ch. 5, § 1101 (Smith-Hurd Supp. 1980); IND. CODE ANN. 34-1-52-4(a)) (Burns Supp. 1982); KY. REV. STAT. ANN. § 413.072(1) (Baldwin 1983); S.C. CODE ANN. § 46-45-10(1) (Law Co-op Supp. 1981). In unofficial Atty. Gen. Op. 51 at 2 (Georgia 1980) construction of the statute was based upon the legislature's declaration of policy.

86. GA. CODE ANN. § 41-1-7 (1982).

tant because it avoids judicial guesswork as to legislative intent.[87] The agricultural use preference is conclusive in this type of statute only if a second key element, chronological priority for a set period of time,[88] is present. This priority can be of use[89] or of ownership.[90] (The traditional coming to the nuisance defense, based upon a rationale of implied consent or assumption of risk, focused on this latter factor.[91])

Concern with the timing of a plaintiff's ownership of the property is reflected in a group of statutes focusing on more intensive types of agricultural operations, such as feedlots,[92] egg-production houses, and dairy farms.[93] Under these statutes, the fact that the

87. 2A C.D. SANDS, STATUTE AND STATUTORY CONSTRUCTION 15-19 (4th ed. 1973). This formulation of intent is particularly useful since most states are notoriously short on legislative history which can guide interpretations of the particular statutes. M.L. COHEN, HOW TO FIND THE LAW 217-218 (7th ed. 1976); M.O. PRICE, H. BITNER & S.R. BYSIEWICZ, EFFECTIVE LEGAL RESEARCH 131 (4th ed. 1979).

88. In most jurisdictions this period is one year. *See, e.g.*, ARK. STAT. ANN. § 34-122 (Supp. 1981); DEL. CODE ANN. tit. 3, § 1401 (Supp. 1982); MISS. CODE ANN. § 95-3-29(1) (Supp. 1982); TEX. AGRIC. CODE ANN. § 251.004 (Vernon 1982). A few jurisdictions, however, provide for a different time period. *See, e.g.*, OR. REV. STAT. § 30.935 (1981) (no duration requirement); CAL. CIV. CODE § 3482.5(a) (Supp. 1982) (three years); UTAH CODE ANN. § 78-38-7 (Supp. 1981) (three years).

89. *See infra* note 106.

90. *See infra* notes 101-02.

91. *See* PROSSER, *supra* note 57, § 91, at 611; Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958); Gilbert v. Showerman, 23 Mich. 447, 455 (1871); Fuchs v. Curran Carbonizing & Engineering Co., 279 S.W.2d 211, 218 (Mo. Ct. App. 1955); Fernandez v. Esdorn Lumber Corp., 50 N.Y.S.2d 904 (1944); East St. Johns Shingle Co. v. Portland, 195 Or. 505, 246 P.2d 554 (1952); Powell v. Superior Portland Cement, Inc., 15 Wash. 2d 14, 129 P.2d 536, 538-39 (1942).

92. IOWA CODE ANN. §§ 172D.1-.4 (West Supp. 1982-1983); NEB. REV. STAT. § 81-1506 (Supp. 1981); WYO. STAT. §§ 11-44-101 to 104 (1977). The Iowa statute, adopted in 1976, is based upon a recognition that the air, water, and noise pollution generated by feedlots is generally regulated by a complex series of state and local statutes. Compliance with these regulations is an absolute defense against a neighbor who acquired ownership of his property after the feedlot began operation. IOWA CODE ANN. § 172D.2. *See* Burke, *Common Scents: An Analysis of the Law of Feed Lot Odor Control*, 10 CREIGHTON L. REV. 539, 556-559 (1977). The Wyoming statute also provides the complying feedlot owner with an absolute defense against nuisance actions by subsequent owners of adjoining property. WYO. STAT. § 11-44-102 (1977). The Nebraska statute is an amendment to the state's Environmental Protection Act which does not provide an absolute defense, but states that compliance with regulations, operation prior to plaintiff's ownership, and use of reasonable techniques to minimize annoyances provide *prima facie* evidence that the feedlot is not a nuisance. NEB. REV. STAT. § 81-1506 (Supp. 1981). *See also* Burke, *supra* this note. Note, *Private Nuisance: An Application to Feedlots in a Rural Area*, 55 NEB. L. REV. 683 (1976). For a discussion of the particular problems raised by feedlots, see Recker, *Animal Feeding Factories and the Environment: A Summary of Feed Lot Pollution, Federal Controls, and Oklahoma Law*, 30 SW L.J. 556 (1976); Note, *Ill Blows the Wind that Profits Nobody: Control of Odors from Iowa Livestock Confinement Facilities*, 57 IOWA L. REV. 451 (1971).

93. TENN. CODE ANN. §§ 44-18-101 to 104 (Supp. 1983). The Tennessee statute follows the

plaintiff's "date of ownership" is subsequent to the "established date of ownership" of the defendant's operation is a defense to the plaintiff's nuisance action. This focus on the date of a plaintiff's purchase of the property has a number of advantages. It is consistent with the traditional defense of coming to the nuisance. It also assures that any plaintiff barred by the statute has had at least constructive notice of the extent to which he/she may be undertaking to endure a nuisance. Moreover, this approach is consistent with our visceral sense that it is unfair[94] to allow an individual buying property with full notice of a neighbor's activities (and perhaps at a discounted price because of those activities) to stop the neighbor's operation.[95]

The difficulties of focusing upon prior ownership, as opposed to prior use, are two-fold. First, this approach places the purchaser of property in a significantly worse position than that of the prior owner of the property, since the sale dissolves the right to a cause of action in nuisance. This result may impair the ability of the prior owner to sell the property, frustrating the traditionally important policy of free alienability of land.[96] Analysis of the following factual situation highlights the problem: X and Y live on adjoining ten-acre plots of land which they purchased simultaneously. Two years later X begins an egg-production operation in his backyard. Under a priority of ownership statute, Y can sue successfully to abate any nuisance created by this operation, but Z, a purchaser from Y, would be unable to do so. Therefore, the property is worth less in the hands of Z than it was in the hands of Y, and Y is effectively discouraged from conveying his property. Y's obvious course of action, before attempting to convey the property, is to sue X in

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same general pattern as the Iowa and Wyoming statutes, in that a complying agricultural operator has an absolute defense to nuisance suits by neighbors who purchase their land subsequent to the commencement of his/her operation. *See* COUGHLIN AND KEENE, *supra* note 16, at 101-02.

94. *Accord* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1976). Professor Ellickson, in Ellickson, *Alternatives to Zoning: Covenants, Nuisance Controls and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 758-62 (1973), argues that it is inequitable to allow a plaintiff who comes to a nuisance to secure an injunction, or damages for improvements placed upon the property after defendant's use began.

95. For an economic analysis of this factual pattern, see Whittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557 (1980); Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293, 303 (1969).

96. *Accord* Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1326 (1977). Professor Rabin suggests that an owner of land who has a good cause of action in nuisance against another landowner in effect has a servitude on the defendant's land, and that the right to this servitude should not be diminished by the transfer of the property.

order to enjoin the nuisance so that no interference to Y's enjoyment is possible. This strategy has the beneficial effect of providing certainty but it also has the negative result of encouraging litigation; Y might have chosen to live with the problem indefinitely were it not for concern about the property's market value. Such litigation is directly contrary to statutory intent because agricultural operations that might have continued without opposition indefinitely instead will face litigation, if not court-ordered abatement.

The second drawback of a focus on the date of purchase is its limitation on the applicability of the statute. The purpose of the statute is to protect agricultural operators' use of their land. The protection of a statute focusing on priority of ownership, however, is limited to those agricultural operators who are surrounded by properties that have recently changed hands.

By contrast, the majority of statutes[97] focus not on changes in a plaintiff's individual ownership but upon a defendant's use prior to changes in the locality as a whole.

The important question in a prior use statute is not whether the plaintiff bought the property before the commencement of the defendant's operation but whether the defendant's use of the property was reasonable for the locality at the time the use was begun, so that it became an actionable nuisance only as a result of changed conditions in the area. For example, if X and Y are in a changed conditions jurisdiction, Y's right (or that of a successor-in-title) to enjoin X's poultry operation depends upon the nature of the locality at the time X invested in the operation. If the area was an agricultural one where such operations were appropriate, Y typically has one year from the date X began his operation to challenge the use, and subsequent to that period, neither Y nor Y's successors-in-title have a right of action against X. This is true even if Y builds twenty residences on the site and thereby effectively changes the predominant use of land in the immediate vicinity. The statute functions as a short statute of limitations.[98] At the end of the designated time period, X can be viewed as having acquired a prescriptive easement

97. *See, e.g.*, ALA. CODE § 6-5-127(a) (Supp. 1981); MD. CTS. & JUD. PROC. CODE ANN. § 5-308(c) (Supp. 1983); N.C. GEN. STAT. §§ 106-701(a) (Supp. 1981); UTAH CODE ANN. § 78-38-7(1) (Supp. 1981); VA. CODE § 3.1-22.29 (Supp. 1981); WASH. REV. CODE ANN. § 7.48.305 (Supp. 1982).

98. Born v. Exxon Corp., 388 So. 2d 933, 934-35 (Ala. 1980) (applying the Alabama statute, which also protects industrial operations, to an oil-treating facility). *See* Note, *supra* note 46, at 159.

over all nearby property to continue the agricultural operation. This analogy breaks down in one important particular, however, in that the statute began to run at the time X commenced the poultry operation, even though the operation was, by definition, not a nuisance at that time.[99] It is quite unlikely, therefore, that any Y exists who could bring an action during the relevant time period. In fact, the only way Y can prevail against X within the one-year period is if conditions change, making X's use a nuisance.

The advantages to the farmer of this priority-of-use approach are obvious. The protection provided to the agricultural operation is substantial. A farmer who initially locates his/her operation in an appropriate locality can be certain (at least within the limitations of the statute) that he has a legal right to continue his operation, a right that cannot be modified by any later action on the part of his neighbors. Thus, the purpose of the statute is achieved more effectively than in a priority-of-ownership jurisdiction, where protection depends upon whether all of the neighboring property has changed hands.

Priority of use also has benefits for plaintiffs in certain situations. This approach excludes from the statute's protections a person who bought land prior to the plaintiff, but who began the agricultural operation after the plaintiff's purchase. This situation is illustrated by the case of *Herrin v. Opatut*,[100] in which the defendant started a poultry operation after the plaintiff began to use his land for nonagricultural purposes. The Georgia Supreme Court found that because the defendant began his operation in a residential area, its status as a nuisance did not result from changed conditions and,

99. A number of statutes specifically provide that to qualify for protection, the operation must not have been a nuisance at the time it began. *See, e.g.*, ALA. CODE § 6-5-127(a) (Supp. 1981); CAL. CIV. CODE § 3482.5(a) (West Supp. 1982); FLA. STAT. ANN. § 823.14(4) (West Supp. 1982); ILL. ANN. STAT. ch. 5, § 1103 (Smith-Hurd Supp. 1981); KY. REV. STAT. § 413.072(a) (Baldwin 1983); TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 1982). This requirement, if read literally, could raise evidentiary problems for a farmer seeking to avail himself of the benefits of the statute; many of the agricultural operations may have been started by a defendant's ancestors or predecessors in title at the time the land was settled, many decades before the lawsuit arose. If the statutory language is interpreted literally, the burden of proving this fact in order to assert the right-to-farm law as a defense could circumvent the intent of the entire statute, as well as raise difficult legal questions as to what rules of nuisance should apply—those in effect in, say, 1890, or those currently in effect? COUGHLIN & KEENE, *supra* note 16, at 100-01. The obvious solution to this dilemma is to read such a statute as requiring that the operation not be a nuisance at the time the duration requirement began to run. That interpretation would be consistent with the intent of the statute and with common sense.

100. 248 Ga. 140, 281 S.E.2d 575 (1981).

therefore, the operation was not protected by the statute.[101]

The negative aspect of the priority-of-use approach, as compared with the priority of ownership rule, is that the assumption of risk rationale, which makes us comfortable with the fairness of requiring a purchaser to take the property as he finds it, is considerably diluted. Under the use rule, notice is provided not by the particular use the defendant is making of the property, but by the nature of the overall locality. This situation is analogous to the one when constructive notice is used by a court to read restrictive covenants into an individual plaintiff's deed where an inspection of the neighborhood reveals a consistent pattern of land use.[102] Thus, a person who purchases vacant or agricultural land before development has occurred has actual notice that agricultural use is appropriate to the area. Any person who buys land after conditions have changed, that is, when agriculture is no longer the predominant use, must have actual notice of the defendant's operation since, in order for a defendant to make use of the statute, his/her farm must have been operating at least a year before the change occurred.

Although emphasis on some type of priority is found in most statutes, several legislatures have chosen a different approach. The Oregon statute simply provides that "a farming practice shall not be declared or held to be a private or public nuisance."[103] With no requirement of either an expressed or an implied priority, the Massachusetts statute (already unique in that it is concerned only with odors) exempts normal farming odors from the definition of nuisance.[104] Michigan, by contrast, has not rejected the concept of priority but made it an alternate basis for protection from liability.[105]

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101. *Id.* at 578-79.

102. Sanborn v. McLean, 233 Mich. 227, 232, 206 N.W. 496, 497 (1925)

103. OR. REV. STAT. § 30.935 (1981). A priority provision was considered and rejected by the Oregon legislature. Note, *supra* note 46, at 167-68.

104. MASS. GEN. LAWS ANN. ch. 111, § 125A (West Supp. 1983).

105. MICH. COMP. LAWS ANN. § 286.473 (West Supp. 1982-83) provides:

> Circumstances Under Which Farms or Farm Operations are not Public or Private Nuisances
>
> Sec. 3.(1) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy as determined by the director of the department of agriculture. .
>
> (2) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and before such change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

The problem with eliminating the priority requirement is exemplified in *Rowe v. Walker*,[106] the first case tried under the Michigan statute. In *Rowe*, the defendant was the owner of a ten-acre parcel of land in a neighborhood of similar holdings approximately fifty miles from Detroit. Soon after he bought the property in 1969, the defendant began a corn-farming operation which grew to encompass approximately 1600 acres of leased land. In order to process his corn, he purchased a large grain dryer which, according to neighbors, was a nuisance because of the noise it produced.[107] When defendant Walker and his neighbors were unable to settle their differences, ten owners of neighboring properties filed suit, alleging first a violation of deed restrictions and second that the defendant was operating a nuisance. Defendant Walker filed a motion for summary judgment on the nuisance claim, raising the Michigan Right-to-Farm Act[108] as a defense. The plaintiff, in answering the motion, argued that the defendant did not come within the protection of the statute, that the statute was so vague as to be unconstitutional, and that clauses (a) and (b) of the act should be read as requiring both priority of use and commercially acceptable practices.[109] The court rejected the plaintiff's arguments and granted the defendant partial summary judgment with respect to the nuisance count.[110]

If, as the plaintiff alleged,[111] the defendant's commercial agricultural operation began after the plaintiffs purchased their property, this case illustrates the extent to which a statute that does not require any type of priority by the farmer raises very different questions of fairness than statutes requiring priority. Arguments that are

106. No. 81-228769 (Oakland Co. Cir. 1982).

107. In addition to the noise from the drying machine, the plaintiffs objected to "odors, dust, fumes and bright light during the night hours" resulting from the defendant's operations. *Rowe*, *supra* note 106, Complaint at 3. For a discussion of the factual background of this case see Lehnert, *Does This Farm Have a Right to Be?*, Mich. Farmer, Feburary 20, 1982, at 15, col. 1.

108. *Rowe*, *supra* note 106, Defendant's Brief in Support of Motion for Partial Summary Judgment as to Count II of Plaintiff's Complaint.

109. *Rowe*, *supra* note 106, Plaintiff's Memorandum in Support of Answer to Motion for Partial Summary Judgment at 7.

110. *Rowe v. Walker, Michigan Right-to-Farm Act Wins First Test in Court*, The Great Lakes Fruit Growers News, May 1982, at 36, col. 1 (Oakland Co. Cir. 1982); Rowe, *Right-to-Farm Law Survives Challenge*, Detroit Free Press, April 24, 1982, at 8B, col. 1 (Oakland Co. Cir. 1982). No written opinion was issued in this case, and the issue involving deed restrictions on the defendant's land was settled out of court.

111. *Rowe*, *supra* note 106, Plaintiff's Memorandum in Support of Answer to Motion for Partial Summary Judgment at 9.

grounded in the homeowner's assumption of risk based upon existing uses are dissolved, leaving the policy of preserving farmland standing alone. The fact that the defendant was located in a rural estate zone within which agriculture was designated the primary use,[112] arguably provided the plaintiff with constructive notice that such uses would be protected within the zone. Therefore the harshness of such a statute was mitigated in this instance, and perhaps will be in other similar situations.

III. THE BOUNDARIES OF THE RIGHT-TO-FARM DEFENSE

The bare-bones Georgia statute discussed above provides a framework within which courts can fashion protection for farmers from nuisance suits, but it leaves a number of important questions unanswered. Using a variety of techniques, various states have attempted to resolve the problems generated by the imprecision of this type of general statute.

The first question left unanswered by statutes of the Georgia type is what, if any, legally enforceable limitations remain on the farmer's activities. On its face the statute[113] provides no exception to the scope of its protection. Even in the absence of any explicit exception, however, a farmer's freedom from liability under the statute is not unlimited. He is protected by such a statute from liability for nuisance, based upon interference with the use and enjoyment of another's land as distinguished from another's person, whether the cause of that interference was an unreasonable intentional action[114] or an unintentional but negligent action.[115] For example, when a farmer negligently piles manure in a location that contaminates the plaintiff's well,[116] under a broad statute the farmer should not be held liable for the plaintiff's property damage. To conclude otherwise would mean the statute essentially provides a defense to only some nuisances, a result not supported by the statutory language. On the other hand, if the plaintiff becomes ill as a result of that

112. *Rowe*, *supra* note 106, Affidavit of Leslie L. Wright (Supervisor of Brandon Twp.) in Support of Motion for Summary Judgment.

113. GA. CODE ANN. § 41-1-7 (1982). In addition, other statutes which do not explicitly provide for any exception include: ARK. STAT. ANN. §§ 34-120-126 (Supp. 1981); MASS. GEN. LAWS ANN. ch. 111, § 125A (West 1983); MISS. CODE ANN. § 95-3-29 (Supp. 1982); OKLA. STAT. ANN. tit. 50, § 1.1 (West Supp. 1981-82).

114. *See supra* note 72 and accompanying text.

115. *See supra* note 70.

116. *See* Van Brocklin v. Gudema, 50 Ill. App. 2d 20, 199 N.E.2d 457 (1964).

contamination, the statute does not preclude a cause of action for personal injury resulting from the negligent operation of the defendant's farm.[117]

A. The Negligence Exception

The potential harshness of providing the farmer with a defense to damages caused by his own breach of duty has been addressed by the numerous states that have explicitly exempted negligent activity on the part of the farmer from their right-to-farm statutes' protection.[118] In those states, a plaintiff who alleges negligent operation by a defendant may prevail even though the injury is to his/her property instead of his/her person.[119] Such a limitation on the scope of the statute provides a reasonable measure of protection to a defendant's neighbors without seriously diminishing the statute's effectiveness. Articulating this limitation by reference to negligence, a legal term of art,[120] allows those activities excluded from protection to be analyzed in terms of a series of well-settled necessary elements.[121] As a result, a defendant in an action alleging negligence, although lacking an affirmative defense, has some certainty as to the standards which will be applied concerning the duty owed, the duty breached, causation and the injury.[122]

Uncertainty remains, however, in the question of the extent to

117. This is true not only of negligent activities, but also of reckless and abnormally dangerous activities that result in personal injury. In addition, the statute provides no defense to an action in trespass. In the State of Oregon this is a sizeable loophole in the statute's protection since the case of Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960), held that air particles can inflict sufficient physical intrusion to support an action in trespass. *See* Note, *supra* note 46, at 165-66. Most jurisdictions, however, have been unwilling to extend the scope of actions in trespass to invisible particles. W. ROGERS, ENVIRONMENTAL LAW § 12.3 at 156-57 (1977); *see generally supra* note 62.

118. IND. CODE ANN. § 34-1-52-4(g) (Burns Supp. 1983); KY. REV. STAT. § 413.072 (Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (Supp. 1982); OR. REV. STAT. § 30.953(3)(a) (1981) (Supp. 1982).

119. *See* Stone Container Corp. v. Stapler, 263 Ala. 524, 83 So. 2d 283, 288 (1955) (providing that a similar Alabama statute protecting industrial and manufacturing operations was not a bar to relief when plaintiff alleged negligence on the part of defendant). *See also* St. Louis-San Francisco Ry. Co. v. Wade, 607 F.2d 126, 130 (5th Cir. 1980) (providing that under a similar Alabama statute the plaintiffs need to prove negligence only if the defendant's operation was not a nuisance at the time it began and became a nuisance only as a result of changed conditions).

120. Legal terms found in a statute are generally presumed to have been used in a legal sense. C.D. SANDS, *supra* note 87, § 47.30 at 152.

121. PROSSER, *supra* note 57, § 30 at 143-44.

122. This avoids the problems created by the use of terms of uncertain meaning such as "improper." *See infra* notes 124-32.

which an evaluation of the reasonableness of the farmer's actions (to determine whether a duty has been breached) is or should be influenced by the strong policy of protecting agricultural operations. For example, if a farmer negligently uses an herbicide which causes the plaintiff to develop a rash, to what degree should the farmer's duty be measured by the fact that the farming operation is located near the plaintiff's residence? The extent to which an additional duty of care is imposed upon a farmer because of the changed condition in the neighborhood is the extent to which the availability of a cause of action in negligence dilutes the effectiveness of the statute.[123]

B. Liability for "Negligent and Improper" Operation

Despite potential problems, the negligence standard is a reasonable limitation on the scope of the statute. Many states, however, have chosen to embellish the simple legal term by extending the exception to "negligent and improper" operations.[124] Unlike the word "negligent," the word "improper" does not have a well-recognized legal meaning. It has appeared in case law primarily in the context of discussions about whether a business operation located in the appropriate district or zone can be deemed a nuisance.[125] The term "improper" has been used either to indicate activities which are not "ordinary and necessary"[126] to business operations or to indicate lack of conformity to normal business practices.[127] It has also been equated with activities which are "injurious and offensive."[128]

123. This is equally true of actions based upon reckless or abnormally dangerous conduct. Both of these torts are dependent upon a finding that the activity in question was unreasonable in the locality where it occurred. RESTATEMENT (SECOND) OF TORTS §§ 500, 520(e) (1977). The same change of conditions which would make defendant's action a nuisance might also result, therefore, in a finding that those actions were abnormally dangerous.

124. *E.g.*, ALA. CODE § 6-5-127(a) (Supp. 1982); DEL. CODE ANN. tit. 3, § 1401 (Supp. 1982); IDAHO CODE § 22-4503 (Supp. 1982); ILL. ANN. STAT. ch. 5, § 1103 (Smith-Hurd Supp. 1982-83); LA. REV. STAT. ANN. § 51.1202A (West Supp. 1983); N.H. REV. STAT. ANN. § 430-C:3 (1983); N.C. GEN. STAT. (Supp. 1981); N.D. CENT. CODE § 42-04-02 (Supp. 1981); S.C. CODE ANN. § 46-45-30 (Law Co-op Supp. 1982); UTAH CODE ANN. § 78-38-5(1) (Supp. 1981); VA. CODE § 3.1-22.29A (Supp. 1982).

125. *See infra* notes 253-56 and accompanying text.

126. Georgia R. & Banking Co. v. Maddox, 116 Ga. 64, 42 S.E. 315, 321 (1902) (construction and operation of a railroad terminal). Kirk v. Mabis, 215 Iowa 769, 246 N.W. 759, 762 (1933) (operation of a funeral home with "proper, reasonable and ordinary care").

127. Pig'n Whistle Sandwich Shops v. Keith, 167 Ga. 622, 146 S.E. 455, 456 (1929) (operations of sandwich stand all night in a noisy manner).

128. Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976, 977 (1922) (funeral home in proper district not a nuisance). *See also* City of Nevada v. Welty, 356 Mo. 734, 203 S.W.2d 459, 462 (1947) (stock pens can be operated in a "lawful and proper manner").

When combined with the term negligence it is often treated as synonymous with negligent.[129]

The most thoughtful explanation of the term is found in the case of *Jedneak v. Minneapolis General Electric Company*.[130] In that case, the Minnesota Supreme Court was asked to determine whether or not the defendant's electric power plant located in an industrial zone was a nuisance. The court concluded that legislative authorization of the location was no defense and that a decision whether or not the defendant's use was an unreasonable interference with the plaintiff's use of land depended upon whether or not the plant was properly operated.[131]

The court also suggested definitions for the terms "proper" and "improper": "As used in the instruction, 'proper operation' meant that defendant had used all precautions reasonably available to restrict the degree to which surrounding residents were inconvenienced. By 'improper operation' was meant that defendant had not, as contended by plaintiffs, incorporated into the plant methods of established superiority."[132] The problem with extending this definition to the right-to-farm statutes is that it was developed as a standard for evaluating the *intentional* invasion of a plaintiff's right to use his/her property, not as an addition to the negligence standard of unintentional conduct. In effect, the court said that a defendant has a duty to take all reasonable measures to prevent harm to a plaintiff, whether the source of the harm is intentional or unintentional conduct.

Since the meaning of the "negligent and improper" standard is not clearly distinguishable based upon the case law, a possible alternative source of interpretation may be found in its common meaning. The word "improper" is defined by *Webster's Unabridged Dictionary* as "not suited to the circumstances, design or end."[133] It is difficult to envision a circumstance in which an activity "not

129. *E.g.*, Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976, 977 (1922) ("There is no evidence that the business was conducted in a negligent or improper manner.").

130. 212 Minn. 226, 4 N.W.2d 326, 329 (1942).

131. 4 N.W.2d at 329. The court stated:

> Though negligence upon part [sic] of defendant need not be proved, whether defendant was doing as much as reasonably was possible in the way of careful operation becomes the measure of whether there has been substantial interference with plaintiffs' enjoyment of life.

132. *Id.* at 329.

133. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1137 (1961).

suited" to the purpose of maintaining agricultural operation which caused damage to plaintiff would not be negligent as well as improper. Nevertheless, the presence of the standard in the statute raises the specter that some action by a defendant that is not negligent will be deemed improper and, therefore, subject the defendant to liability.

Two jurisdictions, New Hampshire and Idaho, have clarified this "negligent or improper" exception by explicitly limiting its scope. New Hampshire provides that "[a]gricultural operations shall not be found to be negligent or improper when they conform to federal, state and local laws and regulations."[134] Similarly, the Idaho statute provides that "[i]mproper or negligent operation means that the agricultural operation is not undertaken in conformity with federal, state and local laws and regulations and adversely affects the public health and safety."[135] In both statutes the terms negligent and improper are treated as a single entity and no attempt is made either to distinguish between the two terms or to indicate what sort of operation might be improper without being negligent. Although these definitional sections do alleviate the problem of ambiguity[136] in part, the incorporation of a nebulous term such as "improper" can only serve to dilute the effectiveness of the statute in providing a farmer both protection against lawsuits and predictability as to what activities can be pursued without fear of liability.

C. Conformity With Industry Standards

A number of states have adopted an alternative approach by providing that an operation, in order to benefit from the statute, must conform to industry standards,[137] of good or generally ac-

134. N.H. REV. STAT. ANN. § 430-C:3 (Supp. 1983). The previous provision, § 430-C:2, provided that the protections of the statute would not apply when the operation is injurious to the public health or safety under the state's statutes.

135. IDAHO CODE § 22-4502(2) (Supp. 1982).

136. This has been a particular concern of commentators. *See* COUGHLIN AND KEENE, *supra* note 16, at 101; E. Thompson, *Defining and Protecting the Right to Farm*, 5 ZONING AND PLANNING LAW REPORT 57 (Part I), 65 (Part II) (1982).

137. *E.g.*, ARIZ. REV. STAT. ANN. § 3-1061 (West Supp. 1982-83) (operations "consistent with good agricultural practice"); CAL. CIV. CODE § 3482.5(a) (West Supp. 1982) ("in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations in the same locality"); 1981 CONN. GEN. STAT. ANN. § 19a-341 (West 1983) ("generally accepted farming procedures"); ME. REV. STAT. ANN. tit. 17, § 2805.2 (1983) ("generally accepted agricultural practices"); MICH. COMP. LAWS ANN. § 286.473 (Supp. 1982-83) ("generally accepted agricultural and management practices"); MONT. CODE ANN. § 27-30-101(3) (1981) ("normal operation"); VT. STAT. ANN. tit. 12, § 5753(a) (Supp. 1982-83) ("consistent with

cepted agricultural practices. At common law, the observance of good agricultural (or industrial) practices and the use of the best available technology are not defenses to a nuisance action,[138] although in some instances they are factors to be weighed by the court in evaluating the reasonableness of a defendant's actions.[139] The right-to-farm statutes change the common law by providing that compliance with an appropriate standard, in conjunction with priority of use, is an affirmative defense to nuisance actions. Although the burden of proof is not specifically allocated by the right-to-farm statutes, it is likely that the burden of demonstrating compliance with the industry standard will be on the agricultural operator asserting the defense, as is the case with other affirmative defenses. Meeting that burden can be difficult when the standard is as amorphous as "good agricultural practices" or "normal farm operations." In the absence of clearly formulated industry-wide standards, proving compliance normally will involve the use of expert witnesses. In *Rowe*, testimony in support of the defendant was provided by the head of the Agricultural Department's Soil and Conservation Division and by the local agricultural extension agent.[140] Such an approach is clearly workable, but it raises both the problem of increasing the cost of the litigation substantially, and of creating a "battle of the experts" situation. In addition, that approach does not provide a farmer with a clear picture of the standards to which his/her conduct must conform so as to be protected by the statute, until the dispute reaches the courts.

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good agricultural practices"); WASH. REV. CODE ANN. § 7.48.305 (Supp. 1982) ("consistent with good agricultural practices").

138. Williams v. Wolfgang, 151 Iowa 548, 132 N.W. 30 (1911) (no defense that plaintiffs made no allegation that stable was improperly kept); Gerrish v. Wishbone Farm of New Hampshire, Inc., 108 N.H. 237, 231 A.2d 622 (1967) (use of modern disposal method no defense); Boomer v. Atlantic Cement Co. 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (meeting industry standards no defense to liability for permanent damages); Kobs v. Zehndner, 326 Mich. 202, 40 N.W.2d 120 (1950) (fact that activity is "good farming practice" is no defense).

139. Smith v. Staso Milling Co., 18 F.2d 736, 739 (2d Cir. 1927) (L. Hand, J., granting plaintiff an injunction but allowing defendant relief from the injunction "upon showing there are no better arresters extant, that it operates those it has at maximum efficiency . . . ."). McIntosh v. Brimmer, 68 Cal. App. 770, 775, 230 P. 203, 204 (1924) (with employment of "reasonable and modern methods" the alleged nuisance might be prevented); Dill v. Excel Packing Co., 183 Kan. 513, 522, 331 P.2d 539, 547 (1958) (feed lot was "average kept" with attention to sanitation considered by the court as one factor); Abdella v. Smith, 34 Wis. 2d 393, 400, 149 N.W.2d 537, 541 (1967) (defendant "adopted all accepted and modern methods" in riding stable operations).

140. *Rowe*, *supra* note 106. The Michigan policy which the Agriculture Department is required by the statute to prepare, had not yet been officially adopted at the time of the summary judgment hearing.

Three states have attempted to eliminate these problems by delegating responsibility for the formulation of agricultural industry standards to their departments of agriculture. Connecticut provides that inspection and approval of the facility by its department of agriculture is "prima facie" evidence that the operation follows generally accepted agricultural practices.[141] Maine simply provides that generally accepted agricultural practices are to be "determined" by the commissioner of agriculture, food and rural resources in accordance with Maine's Administrative Procedure Act.[142] In Michigan, the industry standard is to be set by a "policy" determined by the director of agriculture.[143] The formal statement of Michigan's policy on agricultural industry standards was approved in April of 1982 after extensive statewide hearings. In this policy statement various types of farm operations are categorized by product, for example, fruit tree production, mushroom production and field crop production. In some instances the policy is reasonably specific (for example, chemical products should be used in accordance with label instructions), but in the majority of categories the standard is established as those actions "in accordance with generally accepted management practices."[144] This description leaves the court and the potential litigants with little more knowledge than they had before the policy was completed, and still in need of expert testimony.

The New Jersey legislature, rather than relying upon the state department of agriculture to formulate appropriate practices, estab-

141. 1981 Conn. Acts 226(a) (Reg. Sess.). In Da Capua v. Cello, No. 19-85-59 (New Haven Dist. Ct. 1982) testimony by a state agriculture inspector with respect to the procreation of flies in manure spread on a portion of defendant's farm was used by the court to support a finding that defendant's dairy farm fell within the protection of the Right-to-Farm Act.

142. ME. REV. STAT. ANN. tit. 17 § 2805.2 (1983).

143. MICH. COMP. LAWS ANN. § 286.473(1) (Supp. 1982-83).

144. *See, e.g.*, section E. of the Michigan Policy:

Livestock and Poultry Production (including, but not limited to, commercial production of beef, swine, sheep, dairy, poultry, horses and fish, etc.) should be conducted according to, but not limited to, the following:

- Livestock and poultry should be managed in accordance with generally accepted management practices.
- Organic wastes produced in conjunction with or resulting from these operations should be stored, transported, processed and/or applied to the land in accordance with generally accepted practices.
- Products resulting from livestock and poultry production should be processed, stored and/or transported in accordance with generally accepted practices.
- Application and use (including aerial and ground level spraying and dusting) of federal and state regulated pesticides and insecticides should be in accordance with label directions.

lished by statute an agricultural development committee. The committee, which includes, in addition to state officials, four members who are farmers and two members of the general public,[145] recommends agricultural management practices and works out any conflicts between the recommended practices and any state regulations. Obviously, the value of the committee will depend upon its willingness to formulate clear standards against which farm activities can be measured. In the absence of such concrete criteria, Connecticut's system of inspection may be the most workable approach in that it at least provides an easily ascertainable, and reasonably inexpensive, basis for resolving these issues at an early stage of litigation, even though it does not provide an agricultural operator with prior notice of potential problems.

Statutes adopting the industry standard approach generally seem to have done so as a functional equivalent of the negligence exception discussed above.[146] These statutes are perhaps based upon the assumption that meeting industry standards is, in itself, an adequate defense to an allegation that defendant acted unreasonably and thereby breached his/her duty to plaintiff. This assumption is, of course, incorrect; although meeting an industry-wide standard is some evidence of reasonable care, it is not conclusive, since the whole industry may have adopted slipshod methods in order to save money.[147] Thus, the protection provided to a plaintiff by requiring that a defendant comply with generally accepted agricultural practices (industry standards) may fall far short of that provided by the more demanding negligence standard.

D. Compliance With Regulatory Enactments

A variation on the agricultural practices approach is found in statutes requiring a defendant's conformity to particular statutes

145. 1983 N.J. Sess. Law Serv. 173-78 (West), to be codified at N.J. STAT. ANN. § 4:1C-12.

146. *See* text accompanying notes 127-32.

147. PROSSER, *supra* note 57, § 33, at 167. *See* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.) *cert. denied*, 287 U.S. 622 (1932). *See generally*, James and Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 709-14 (1952) (discusses basis for admitting evidence of industry standards); Linden, *Custom in Negligence Law*, 11 CAN. B.J. 151 (1968) (examines treatment by Canadian and Australian courts); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942) (general discussion of business custom); Seidelson, *Custom of the Trade and Defendant's Economic Status*, 6 NEW ENG. L. REV. 177 (1971) (effect of particular defendant's economic status on use of evidence of trade custom).

and regulations[148] before he/she is protected by the right-to-farm statute. Under the Tennessee act, for example, covered agricultural operations must comply with the national pollution discharge elimination system created by the Clean Water Act,[149] the Tennessee Air Quality Act, and the regulation of the state health department, as well as local government regulations that are in effect on the effective date of the statute. (These agricultural operations are also exempted from rules and regulations adopted after the later of the effective date of the statute or the date the operation was begun, as well as from zoning and anti-nuisance regulations that become applicable to them because the land upon which they are conducted has been annexed by a city.)[150] These right-to-farm statutes recognize that pollution and health concerns are regulated effectively by specific federal and state statutes and therefore the protections provided by general nuisance concepts can reasonably be withdrawn.

Designating compliance with other specified statutes as a necessary element of an absolute defense to nuisance claims is only one method of structuring the relationship between the various statutes. The least complex relationship is probably that of the right-to-farm statutes to federal statutes (primarily the various federal environmental protection statutes).[151] Enforcement of the federal statutes is based upon requiring compliance with specific standards developed as part of a comprehensive regulatory scheme. Therefore, any cause

148. IOWA CODE ANN. § 172D.2 (West Supp. 1983-84), NEB. REV. STAT. § 81-1506(1)(b)(ii) (Reissue 1981); TENN. CODE ANN. § 44-18-102 (Supp. 1983); WYO. STAT. § 11-44-102 (1977).

149. TENN. CODE ANN. § 44-18-103(a, b) (Supp. 1983).

150. *Id.* § 44-18-104. *See* COUGHLIN AND KEENE, *supra* note 16, at 102.

151. For a general discussion of federal statutes affecting on-farm agricultural practices, see R.E. Beck, *Agricultural Water Pollution Control Law* in 2 AGRICULTURAL LAW, 141-235 (J.H. Davidson ed. 1981), M.M. Breinholt, *Federal Pesticide Regulatory Law* in 2 AGRICULTURAL LAW 236-335 (J.H. Davidson ed. 1981); J.C. JURGENSMEYER & J.B. WADLEY, 1 AGRICULTURAL LAW 567-583 (1982), 2 AGRICULTURAL LAW at 74-80. *See also* Hines, *Farmers, Feedlots and Federalism: The Impact of the 1972 Federal Water Pollution Control Amendments on Agriculture*, 19 S.D.L. REV. 540 (1974); Montgomery, *Control of Agricultural Water Pollution: A Continuing Regulatory Dilemma*, 1976 U. ILL. L. F. 533; Uchtmann & Seitz, *Options for Controlling Non-Point Source Water Pollution: A Legal Perspective*, 19 NAT. RESOURCES J. 587 (1979); Note, *A Procedural Framework for Implementing Nonpoint Source Water Pollution in Iowa*, 63 IOWA L. REV. 184 (1977); Note, *Agricultural Non-Point Source Water Pollution Control Under Sections 208 and 303 of the Clean Water Act: Has Forty Years of Experience Taught Us Anything?*, 54 N.D.L. REV. 589 (1977); Note, *Federal Law, Irrigation and Water Pollution*, 22 S.D.L. REV. 553 (1977). For a general discussion of the types of pollution caused by agricultural operations, see R. GRABER, AGRICULTURAL ANIMALS AND THE ENVIRONMENT (Feedlot Waste Management Project, Oklahoma State University); Hines, *Agriculture: The Unseen Foe in the War on Pollution*, 55 CORNELL L. REV. 740 (1970).

of action against a farmer for failure to fulfill his/her duty under those acts rests upon lack of compliance, not upon a common law nuisance rationale, and the farmer's statutory defense to a nuisance action is irrelevant. Several states specifically defer to federal statutes,[152] and/or explicitly exempt rules promulgated by the state as part of the National Pollutant Discharge Elimination System created by the Clean Water Act.[153] Even when such deference to federal statutes is not explicit, there is no basis for extending the defenses provided by right-to-farm laws to claims involving the federal statutes.

The relation of right-to-farm laws to other state statutes is more complex. The state is under a duty to exercise its police power to protect the public health, safety and welfare. By protecting complying agricultural operations against both public and private nuisance actions, the right-to-farm statutes provide, in effect, that no injunction against the operation is available under a general nuisance statute[154] as a result of a court's balancing of the value of the farm operation against the interference with the rights of the community as a whole. Where the cause of action is founded upon a specific exercise of the police power, and the farm practice in question can be measured against objective standards formulated to protect the public health and safety, rather than based upon changed conditions in the locality, no conflict between statutes should exist, even where the right-to-farm statute does not defer specifically to other state statutes.[155] The primary factual patterns under which direct conflict between these statutes is likely to develop are those situations when a specific environmental statute is framed in nuisance terms[156] or when a charge by the state health department against the defendant (for attracting flies, for example) is based upon the fact that non-agricultural land users have moved into the area. In such cases, at-

152. *E.g.*, ME. REV. STAT. ANN. tit. 17, § 2805.4 (1983); MD. CTS. AND JUD. PROC. CODE ANN. § 5-308(b)(1) (Supp. 1983); MICH. COMP. LAWS ANN. § 286.474 (Supp. 1983-84); TEXAS AGRIC. CODE ANN. § 251.004(c) (Vernon 1982).

153. IOWA CODE ANN. § 172D.3, 2A (West Supp. 1982-83); TENN. CODE ANN. 44-18-103 (Supp. 1983); WYO. STAT. § 11-44-103(g) (1977).

154. IOWA CODE ANN. § 657.1 (West Supp. 1983-84); MICH. COMP. LAWS § 600.3801 (Supp. 1983-84); MINN. STAT. ANN. § 561.01 (West Supp. 1983).

155. *See, e.g.*, ALA. CODE § 6-5-127 (Supp. 1982).

156. *See, e.g.*, ILL. REV. STAT. ch. 111½ § 1003(b) (Cum. Supp. 1983) which defines air pollution as, *inter alia*, the presence of contaminants in quantities sufficient to unreasonably interfere with the enjoyment of life or property. For a more detailed discussion of this problem *see* Grossman and Fischer, *supra* note 46, at 143-45.

tainment of a higher standard is required of the agricultural user because the neighborhood has become residential.

The policy choice of which statute should have priority in the case of a direct conflict of this sort has been resolved by some state legislatures through the drafting of a variety of explicit provisions providing: that the right-to-farm statute shall prevail;[157] that state statutes that have as their specific purpose the protection of the public health and safety shall prevail;[158] or that deference to all state laws[159] is required before the right-to-farm statute can be raised as a defense. In addition, some statutes provide that the right-to-farm statute is only available where the action is not a threat to public health or safety.[160] This last exemption from the protection of the statute creates a loophole so vast that the remaining protections for farms are essentially meaningless. Any lawsuit involving complaints about odors, dust or noise emanating from an agricultural operation would arguably be sufficient to support a finding that public health and safety was injured. A court's discretion under such a limited statute is only slightly narrower than that wielded by a court in a traditional nuisance action. By contrast, a middle position on the spectrum, requiring compliance with directly conflicting health and safety statutes, seems to be an appropriate compromise in that it protects the public without returning to the court broad discretion to enjoin agricultural activities.

E. Conflicts With Local Ordinances

Local ordinances pose a much more serious threat than do state laws to the effective operation of the right-to-farm statutes. The shift in local political power occurring when suburbanites move into an agricultural district often leads to the passage of local ordinances limiting various farm activities.[161] Such ordinances are clearly counterproductive to the goal of encouraging farmers to continue

157. Several statutes explicitly defer to state environmental protection laws. *E.g.*, LA. REV. STAT. ANN. § 51:1202 D (West Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 5-308(b)(2) (Supp. 1982).

158. *See, e.g.*, FLA. STAT. ANN. § 823.14 (West Supp. 1983); OR. REV. STAT. § 30.940(3) (1981).

159. *See, e.g.*, CAL. CIV. CODE § 3482.5(c) (West Supp. 1983); LA. REV. STAT. ANN. § 51.1202 D (West Supp. 1983) (not a defense to actions by the state under environmental laws).

160. ME. REV. STAT. ANN. tit. 17, § 2805(4) (Supp. 1982-1983); MICH. COMP. LAWS ANN. § 286.474 (Supp. 1982-1983).

161. COUGHLIN AND KEENE, *supra* note 16, at 98.

farming. The various statutes addressing the question have adopted contradictory conclusions as to the priority to be given to local government discretion; some statutes defer to local ordinances,[162] while others explicitly preempt them.[163] Insulation from such ordinances is an important component of an effective right-to-farm statute. A state legislature that defers to the local government in this manner effectively nullifies its policy choice of preferring agricultural activities over other conflicting land uses. Protection against such ordinances is generally a feature of state agricultural districting statutes,[164] and is often important in attracting the participation of farmers in such a district. Although experience shows that this protection is seldom formally invoked, the value of an explicit preemption of local statutes and ordinances lies in its ability to discourage local governments from passing limiting regulations and to give the farmer a sense of security against attempted limitations of his/her operations.[165]

Where no specific provision addresses the statute's relationship to local ordinances it is a reasonable conclusion, although by no means a certain one, that the state has fully occupied the field of public nuisance with respect to agricultural operations, thereby preempting local anti-nuisance statutes. The effect of such a preemption may be minimal, however, since unusually creative drafting probably is not required to restrict a farmer's operation substantially[166] by the use of a non-nuisance format, such as zoning.

The relationship between zoning and the right-to-farm laws is a complex one. Where the farm operation in question is located in an agricultural zone or district, the right-to-farm law reinforces zoning by supporting the approved use against the demands of more inten-

162. *E.g.*, DEL. CODE ANN. tit. 3, § 1401 (Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 5-308(b)(1) (Supp. 1982) (local health or zoning requirements excepted).

163. The Kentucky statute provides:

> Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstances set forth in this section are and shall be null and void . . . .

KY. REV. STAT. ANN. § 413.072(5) (Baldwin Supp. 1983). *See also* IDAHO CODE § 22-4504 (Supp. 1983) (local ordinances null and void except in city limits); UTAH CODE ANN. § 78-38-7(3) (Supp. 1981).

164. COUGHLIN AND KEENE, *supra* note 16, at 79-80.

165. *Id.* at 88-89.

166. E. THOMPSON, *supra* note 136.

sive uses.[167] Zoning, however, can also be a way of effectively discouraging agriculture and favoring development in a particular area.[168] The feedlot statutes[169] (joined by the Texas statute)[170] explicitly deal with this contingency by providing that the only zoning ordinances applicable to a given operation are those adopted both before the effective date of the statute and before the agricultural operation began. In addition, where an area containing an agricultural operation is annexed by a city after the effective date of the statute, the city's ordinances and other governmental requirements do not apply.[171] (This is limited under the Texas statute to ordinances "not reasonably necessary" to protect persons from enumerated threats to the public health and safety[172]). These explicit provisions on the applicability of zoning ordinances provide a de-

167. The statute extends and reinforces the common law principle that a defendant's location in a proper zone may be a defense to an action in nuisance. *See infra* note 255. *See also* CAL. CIV. PROC. CODE § 731(a) (West 1980) providing that if a business use is expressly permitted by a zoning ordinance it cannot be enjoined "from the reasonable and necessary operation." This statute has been narrowly construed to allow damages but not an injunction remedy for a nuisance so situated. Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1970).

168. *E.g.*, Borough of Kinnelon v. South Gate Assoc's., 172 N.J. Super. 216, 411 A.2d 724 (1980).

169. IOWA CODE ANN. § 172D.4 (Supp. 1983-84); NEB. REV. STAT. § 81-1506 (1981); WYO. STAT. § 11-44-104 (1978).

170. TEXAS AGRIC. CODE ANN. § 251.005 (Vernon 1982).

171. *E.g.*, the Iowa Statute, *supra* note 169, provides:

172D.4 Compliance with Zoning Requirements

1. Requirement. A person who operates a feedlot shall comply with applicable zoning requirements. *The applicability* of a zoning requirement shall be as provided in subsection 2 of this section. A person complies with this section as a matter of law where no zoning requirement exists.

2. Applicability.

a. A zoning requirement shall apply to a feedlot with an established date of operation subsequent to the effective date of the zoning requirement.

b. A zoning requirement, other than one adopted by a city, shall not apply to a feedlot with an established date of operation prior to the effective date of the zoning requirement for a period of ten years from the effective date of that zoning requirement.

c. A zoning requirement which is in effect on November 1, 1976, shall apply to a feedlot with an established date of operation prior to November 1, 1976.

d. A zoning requirement adopted by a city shall apply to a feedlot located within an incorporated or unincorporated area which is subject to regulation by that city as of November 1, 1976, regardless of the established date of operation of the feedlot.

e. A zoning requirement adopted by a city shall not apply to a feedlot which becomes located within an incorporated or unincorporated area subject to regulation by that city by virtue of an incorporation or annexation which takes effect after November 1, 1976 for a period of ten years from the effective date of the incorporation or annexation.

172. TEXAS AGRIC. CODE ANN. § 251.005(c).

gree of predictability and certainty not found in the more general statutes.

As the above discussion indicates, the relationship between the right-to-farm statute and other potentially conflicting statutes should be set forth as explicitly as possible. The approach which best ensures maximum protection to the public health and safety, while minimizing dilution of the protection afforded by the right-to-farm statute, provides explicitly for deference to federal laws and to those state laws protecting specific public health and safety concerns, and explicitly preempts local ordinances that conflict with the right-to-farm statute.

F. The Scope of Protected Operations

An equally serious issue regarding the scope of the right-to-farm statutes concerns the type of operation that will fall within their protection. This area raises two separate problems; one is fairly easy to resolve, the other is much more difficult. The first problem, that of delineating the specific types of activities covered by the statute, can be resolved by a well-drafted definitional section in the statute itself. This definition should set forth clearly the types of cultivation or animal husbandry protected, and state that the protection covers not only the agricultural operation as a whole but also the individual farm practices necessary to its continuation.[173] Without such clarification, a narrow reading of the statute might support

173. MICH. COMP. LAWS ANN. § 286.472 (Supp. 1982-83) provides an example of a comprehensive definition section:

> Definitions
>
> Sec. 2. (1) As used in this act, "farm" means the land, buildings, and machinery used in the commercial production of farm products.
>
> (2) As used in this act, "farm operation" means a condition or activity which occurs on a farm in connection with the commercial production of farm products, and includes, but is not limited to: marketed produce at roadside stands or farm markets; noise; odors; dust; fumes; operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.
>
> (3) As used in this act, "farm product" means those plants and animals useful to man and includes but is not limited to: forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products; livestock, including breeding and grazing, fruits, vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine and other similar products; or any other product which incorporates the use of food, feed, fiber or fur.

Definition sections in the various statutes vary widely. *Compare* MISS. CODE ANN. § 95-3-29(2)(a) (Supp. 1983) *with* OR. REV. STAT. § 30.930 (1981); TEX. AGRIC. CODE ANN. § 251.002 (Vernon 1982).

a judgment against a significant portion of the agricultural operation if the operation as a whole was not clearly jeopardized.

The more difficult problem, inherent in the structure of the act itself, is the question of the extent to which a farmer may expand or change his/her operation and still be protected by the statute. If substantial expansion is allowed, the rationales of notice and assumption of risk, which are associated with priority of use,[174] arguably are destroyed. The key question is whether the risk actually assumed by the plaintiff is the risk of the particular operation in progress when he/she purchases the property, or the risk of locating in close proximity to agriculture. If the latter is the case, any normal, generally accepted agricultural practice should be protected, and the establishment of any agricultural operation would be sufficient to gain the statute's protection for all operations of that kind on the property.

Although the argument that the risk assumed is the risk of all potential injuries from agriculture is a colorable one, it requires a broad reading of the statute which is probably inconsistent with the actual expectations of a person moving to the property. For example, simply because a homeowner was willing to put up with the occasional noise and dust essential to the successful cultivation of a cornfield, does not mean that he/she also knowingly assumed the risks of the odors, insects, etc., which are inherent in a feedlot operation. When the statute is silent[175] with respect to the treatment of expansion of farm operations, as most are, the interpretation of the statute most consistent with the rationale that the protection granted is to prior use should be chosen. Under that rule, the statute would apply to each activity constituting a discrete farm operation; therefore, any significant expansion must continue unchallenged for one year before it is protected by statute. This interpretation is supported by those statutes that define a protected agricultural operation as "a condition or activity which occurs on a farm"[176] or "[a]ny facility, including land, building, water courses and appurtenances thereto . . . ."[177]

Several jurisdictions deal with the issue through the concept of

174. *See supra* text accompanying note 82.

175. *But see* 3 PA. CONS. STAT. ANN. § 954(a) (Cum. Supp. 1983), which provides that if the physical facilities of an agricultural operation are "substantially altered" the alteration must have existed for one year to come within the protection of the statute.

176. ME. REV. STAT. tit. 17 § 2805.1B (1983).

177. OR. REV. STAT. § 30.930(1) (Supp. 1981).

"established date of operation."[178] For example, the Texas statute provides:

> For purposes of this chapter, the established date of operation is the date on which an agricultural operation commenced operation. If the physical facilities of the agricultural operation are subsequently expanded, the established date of operation for each expansion is a separate and independent established date of operation established as of the date of commencement of the expanded operation, and the commencement of expanded operation does not divest the agricultural operation of a previously established date of operation.[179]

In order to be protected under the Texas statute, the farm's established date of operation for the expansion must precede the lawsuit by one year. Even this explicit statute, however, does not set standards for dealing with changes in operations that do not alter physical facilities, such as where a farmer chooses to switch to a "new" type of cultivation requiring the spreading of massive doses of herbicide.[180] Such a change clearly imposes a new burden on any neighboring residential landowners. The question is whether that burden is substantial enough to make the new type of cultivation a new agricultural operation less than a year old and therefore not protected by the statute.

The lack of an explicit statutory standard for evaluation of expansion of operations provides a strong temptation for any court faced with the problem to analogize to the zoning rules governing nonconforming uses. The application of these rules to questions involving the expansion of protected agricultural operations would be undesirable because those zoning rules are generally too strict and inflexible; they sometimes require, for example, that a nonconforming use that has been destroyed may not be rebuilt.[181] Despite their

178. *E.g.*, MISS. CODE ANN. § 95-3-29(b) (Supp. 1983); TEX. AGRIC. CODE ANN. 251.003 (Vernon 1982). The concept was introduced in the feedlot statutes, which provided that the defendant's established date of ownership had to precede the plaintiff's date of ownership of property. *See supra* note 154.

179. TEXAS AGRIC. CODE ANN. 251.003 (Vernon 1982).

180. *See* E. Thompson, *supra* note 166. COLO. REV. STAT. § 35-3.5-102(1) (Cum. Supp. 1982) deals with the problem by excluding from the scope of the act any operation in which "a substantial increase in the size of the operation occurs."

181. A nonconforming use is a use of property that is inconsistent with the current zoning, but was begun before the enactment of the zoning ordinance in question. The continuation of such uses is usually discouraged by various restrictions on the right to repair or to extend the uses. *See* Anderson, *The Nonconforming Use—A Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 214, 230-32 (1959); Comment, *Zoning-Abatement of Prior Non-Conforming Uses: Nuisance Regulations and Amortization Provisions*, 31 MO. L. REV. 280 (1966).

superficial similarity, these two types of expanding prior uses are in fact fundamentally different because unlike a nonconforming use, which is merely a tolerated activity,[182] an otherwise complying agricultural operation is favored by the strong public policy expressed in a statute.

These questions of whether expansion is to be allowed protection under the statute and what constitutes unprotected expansion, have caused skepticism among commentators[183] regarding the usefulness of right-to-farm acts in protecting agricultural operations. This pessimism reflects a belief that, in order to survive and prosper, an agricultural operator must be able both physically and technologically to expand operations.[184] Although in individual factual situations[185] this belief might be justified, in many instances the protection of existing operations places a farmer in a substantially better position than before the passage of the act.

IV. CONSTITUTIONAL VALIDITY OF THE STATUTES

Although it is difficult to predict reliably the effectiveness of right-to-farm laws in preventing the conversion of farmland to other uses, it seems clear that even the best-drafted statute neither provides a panacea for the complex problem of farmland conversion nor substitutes for more comprehensive programs utilizing exclusive agricultural zoning or districting. In addition, even the most effective law does not resolve all land use conflicts between farmers and their neighbors. It provides no defense to many actions based upon negligence or other unintentional torts, and any substantial expansion of the farmer's activities is likely to be unprotected. Finally, problems such as vandalism of the farm by neighbors and excessive traffic on farm roads are beyond its scope of concern. Nevertheless, a statute that provides a farmer with reasonable certainty that his/her operations cannot be enjoined as a result of a nuisance action,

182. R.E. BOYER, SURVEY OF THE LAW OF PROPERTY, 637 (3d ed. 1981).

183. COUGHLIN AND KEENE, *supra* note 16, at 103; E. Thompson, *"Right to Farm" Laws Examined*, Aglands Exchange, Nov.-Dec. 1980 at 2.

184. In agriculture, however, expansion with its accompanying debt is not always the key to economic success. *Compare* Cox, *Plowed Under: Go-Go Young Farmer Who Rode Prices Up Is Laid Low By Debt*, Wall St. J., March 15, 1982, at 1, col. 7 *with* Robbins, *Work, Luck and Little Debt Produce the Good Life for Couple's Iowa Farm*, N.Y. Times, February 20, 1983, at 14, col. 1.

185. In *Rowe*, *supra* note 106, the defendant alleged that without the larger grain drier he could not continue to operate economically.

encourages the farmer to resist the other forces that are pressuring him to liquidate his investment by selling his farm for development.

Right-to-farm statutes, therefore, in combination with other preservation programs, can mitigate the pressures to convert farmland to other uses and, as such, they are an effective tool in the overall effort to develop farmland preservation programs. This conclusion does not, however, answer the serious underlying question of whether, effective or not, these statutes are valid under the procedural and substantive provisions of the United States Constitution[186] (or analogous provisions of state constitutions).[187] The following analysis of the constitutionality of the statutes focuses briefly on the due process clause of the fifth amendment and the equal protection clause of the fourteenth amendment, and more fully on the takings clause of the fifth amendment.

A. Questions of Procedural Due Process

The fifth amendment prescription that a person shall not be deprived of "life, liberty or property without due process of law"[188] provides several constraints on the scope of governmental action. The first, which limits the procedures that a government may use to reach and enforce its decisions,[189] is traditionally termed "procedural due process." The passage of a right-to-farm statute, like any legislative action, is generally outside the scope of this procedural due process limitation.[190] For example, the Supreme Court has upheld the right of a legislative body to increase taxes on property, thus directly affecting the economic interest of the landowner without allowing that landowner any special notice or hearing prior to

186. The attorney general of Iowa, in an opinion issued before the passage of Iowa's Act, suggested that the statute was unconstitutional. *See also* Thompson, *Right-to-Farm Laws Examined,* Aglands Exchange, Nov.-Dec. 1980, at 1, col. 1; E. Thompson in American Law of Zoning and Planning.

187. A discussion of the possible challenges to a right-to-farm law based upon a particular state's constitution is beyond the scope of this article. For a thorough discussion of the ways in which interpretations of state constitutional provisions sometimes differ from those of the United States Constitution, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

188. U.S. CONST. amend. V, *Id.* amend. XIV, § 1.

189. At its most basic, this is a requirement that proper notice and a hearing be provided to those subjected to the application of the particular governmental action in question. Subrin & Dykestra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449 (1974).

190. *See* Rendleman, *The New Due Process: Right and Remedies*, 63 KY. L.J. 531, 559-560 (1975); *Developments in the Law, supra* note 187, at 1504.

passage of the statute.[191] Similarly, a property owner located near an agricultural operation has not been unconstitutionally deprived of property if he/she was not provided an opportunity to present his/her views before the passage of the right-to-farm statute. The rationale for this narrow interpretation of the procedural due process limitation is two-fold. First, it reflects a general judgment that allowing everyone affected by any sort of legislation to present his/her views on the topic would be so cumbersome as to bring the legislative process to a halt.[192] In addition, that burden is believed unnecessary because legislative actions, by their general nature, affect large numbers of people who can effectively protest through the electoral process if they are treated unfairly.[193]

Even if the mechanics of passage of a statute did not raise procedural problems, the statute might still violate procedural due process if its application to individual citizens does not reflect appropriate procedures.[194] The right-to-farm statutes avoid the procedural problems created by the delegation of authority to administrative agencies by structuring the act so that the decision applying the statute to a particular party is made by a judge as part of the normal judicial process.[195] Notice is provided therefore by the usual rules of pleading and the hearing is a full-scale one in open court incorporating the normal evidentiary rules. The decision maker is a judge who, under the canons of judicial ethics, has no stake in the outcome. Thus, the opportunity is amply provided for persons af-

191. Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado, 239 U.S. 441 (1915).

192. *Id.* at 445:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meetings or an assembly of the whole.

193. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1080 (1968); *Developments in the Law—Zoning*, *supra* note 187, at 1509. *But see* Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197 (1978) (arguing that the process of legislation should be subject to judicial review).

194. In other words, the plaintiffs are provided with notice and a hearing before their cause of action is denied because of the statutory defense. *See* Subrin and Dykstra, *supra* note 189, at 453-458. One function of courts is to adapt general statutory provisions to individual cases. *Developments in the Law*, *supra* note 187, at 1507 n.23. *Accord* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 537 (legislatures rely on courts to temper unjust applications of statutes by the "traditions and principles of common law and equity").

195. *See* C.E.E.E.D. v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 321, 118 Cal. Rptr. 315, 325 (1974).

fected by the statute to argue its inapplicability to their own particular case.

B. Substantive Limitations

Although the fact that the statute is applied to a particular set of facts through court action satisfies the hearing and notice requirements of procedural due process, review by a court does not answer questions concerning a statute's substantive validity. Through its police power, a government may restrict property rights in order to protect the public health, safety and welfare.[196] The fifth amendment to the Constitution provides two types of limitations on government exercises of this power—those under the due process clause[197] and those under the takings clause.[198] Although courts evaluating particular regulations often combine the requirements of the two clauses[199] without differentiating the source of a particular requirement, it is instructive to analyze the due process clause and the takings clause separately.[200]

196. Lawton v. Steele, 152 U.S. 133, 136 (1894). "It [the police power] is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement . . . of whatever may be regarded as a public nuisance." *Id. See* Berman v. Parker, 348 U.S. 26, 32 (1954).

197. "Nor [shall any person] . . . be deprived of life, liberty or property, without due process of law." U.S. CONST., amend. V, cl. 3.

198. "Nor shall private property be taken for public use without just compensation." U.S. CONST., amend V, cl. 4. The entire fifth amendment is applied to the states through U.S. CONST. amend. XIV; Chicago B. & Q. Ry. v. Chicago, 166 U.S. 226, 236 (1897); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980).

199. *E.g.*, Agins v. Tiburon, 447 U.S. 255 (1980). "[A zoning ordinance] effects a taking if the ordinance does not substantially advance legitimate state interests, or [if it] denies an owner economically viable use of his land." *Id.* at 260 (citations omitted); Penn. Central Trans. Co. v. New York City, 438 U.S. 104, 127 (1978) *reh'g denied*, 439 U.S. 883 (1979) (regulations must have served a public purpose and not have an "unduly harsh impact" on property use). *See* Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 270 (1982).

200. Distinguishing clearly between the various requirements has become important in the context of a recent active controversy over whether inverse condemnation (requiring the payment of compensation rather than, or in addition to, the invalidation of the regulation) is the appropriate remedy for defective land use regulations. The California appellate courts have taken the position that the appropriate remedy for an invalid land use regulation is invalidation of the ordinance, not a provision for money damages under the just compensation clause. Agins v. Tiburon, 24 Cal. App. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); San Diego Gas and Electric Company v. City of San Diego, 80 Cal. App. 3d 1026, 146 Cal. Rptr. 103 (1978), *appeal dismissed*, 450 U.S. 621 (1981). In both *Agins* and *San Diego Gas*, the United States Supreme Court avoided the issue by deciding the case on other grounds. In *San Diego Gas* there was a strong dissent by Justice Brennan, joined by Justices Stewart, Marshall and Powell, 450 U.S. at 636. *See generally* Marcus, *The Grand Slam Grand*

1. Questions of Substantive Due Process and Equal Protection

Regulations affecting land, like all exercises of the police power, must be directed toward a legitimate public purpose under the due process clause.[201] Thus, the preliminary question underlying any constitutional evaluation of the right-to-farm laws is whether hampering the conversion of farmland to other, usually more intensive, uses is a public purpose.

The legitimacy of such a goal has been affirmed by state courts in upholding the validity of exclusive agricultural zones.[202] Once the legitimacy of the purpose has been established, the statute must

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Central Terminal Decision: A Euclid for Land Marks, Favorable Notice for T.D.R. and a Resolution of the Regulatory/Taking Impasse, 7 ECOLOGY L.Q. 731, 749 n.97 (1978), Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 HASTINGS CONST. L.Q. 545, 578 (1981); Comment, *Municipal Open-Space Ordinance Not a "Taking" of Property: Agins v. City of Tiburon*, 13 CONN. L. REV. 167, 188-200 (1980); Comment, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569 (1977); Comment, *Balancing Private Loss Against Public Gain to Test a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 319-327 (1979); Note, *Supreme Court Fails to Reach Inverse Condemnation Issue*, 21 NAT. RESOURCES J. 169 (1981).

201. Lawton v. Steele, 152 U.S. 133, 137 (1894). "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from a particular class require such interference . . . ." *Id.* "It is, of course, implicit in Goldblatt that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn. Central*, 438 U.S. at 127.

202. Viso v. State, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979); Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978), *cert. denied*, 440 U.S. 957 (1979) (both upholding rezoning of a "general forest district"); Cole v. Board of Zoning Appeals for Marion Twp., 39 Ohio App. 2d 177, 317 N.E.2d 65 (1973) (upholding exclusive agricultural district); Joyce v. City of Portland, 24 Or. App. 689, 546 P.2d 1100 (1976) (upholding rezoning of plaintiff's property from residential to farm and forest use); Meeker v. Board of Comm'rs of Clatsop County, 287 Or. 665, 601 P.2d 804 (1979) (modifying general requirements of state planning requirements aimed at preserving land in order to reach that goal in the particular area). The courts have also demonstrated the legitimacy of the public policy of preserving farmland by: defining the relationship between municipal zoning and a state farmland assessment act in Kinnelon v. Southgate Association, 172 N.J. Super. 216, 411 A.2d 724 (1980); and by upholding a statute providing that grantors of property used for school purposes who were living in rural, but not urban, communities have a right to repurchase if the property is no longer so used; see Stephens v. Raleigh County Bd. of Education, 257 S.E.2d 175 (W. Va. 1979). ("It has always been the policy of the State of West Virginia to encourage rural and agricultural endeavors . . . . Despite recent trends of urbanization and in industrialization, the tilling of the earth remains the highest and best use to which land can be put . . . . The preservation of land fit for agricultural-related uses is a legitimate state goal." *Id.* at 180-81. *See also* Comment, *Agricultural Land Preservation by Local Government*, 84 W. VA. L. REV. 961, 973 (1982). The legitimacy of the agricultural purpose was also recently affirmed under the commerce power when the Supreme Court upheld land reclamation provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1976 ed. Supp. III), stating: "In our view, Congress was entitled to find that protection of prime farmland is a federal interest that may be addressed through commerce clause legislation." Hodel v. Indiana, 452 U.S. 314, 324 (1981).

be shown to have a "reasonable relationship" to that purpose.[203] This substantive due process limitation on the legislature's discretion to regulate economic interests is not particularly strict.[204] Courts generally defer to the judgment of the legislature, holding that if "the validity of the legislative classification . . . be fairly debatable, the legislative judgment must be allowed to control."[205] Thus, state legislatures are allowed wide latitude in adopting an economic regulation unless "it is of such a character as to preclude the assumption that it rests on some rational basis . . . ."[206] In general, right-to-farm laws should have no great difficulty in passing muster under this standard of rationality. Although these statutes can hardly be deemed all-encompassing solutions to the problem of farmland conversion, they are responsive to a well-documented, specific aspect of the problem and are therefore clearly within the legislature's discretion.

This presumption of rationality also extends to the legislature's decision to treat activities by farmers in a manner different from similar activity by other citizens. Although the fourteenth amendment requirement that all citizens receive equal protection of the laws creates a separate limitation on the police power in the appropriate circumstances, a classification of citizens need only be rationally related to a legitimate state interest, "[u]nless [it] trammels

203. Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926) (a regulation is unconstitutional if it is "arbitrary and unreasonable, having no substantial relation to the public health, safety, and morals, or general welfare."); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980) ("Due process . . . demands only . . . that the means selected shall have a real and substantial relation to the objective sought to be attained." (quoting Nebbia v. New York, 291 U.S. 502, 525); *Penn Central Co.*, 438 U.S. at 127 (restriction must be "reasonably necessary to the effectuation of a substantial public purpose"). *See generally* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 74; Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 6 (1972); Humbach, *supra* note 199, at 270, 271; Marcus, *supra* note 200, at 741-45.

204. In United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) the court articulated the extent of deference to the discretion of the legislature, stating: "[W]here the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, afford support for [the legislation]." This approach was reaffirmed in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) and Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *See generally* J.E. NOWAK, R.D. ROTUNDA, J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 406-08 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 450-51 (1978); Humbach, *supra* note 199, at 271; McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 39.

205. Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

206. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage . . . ."[207] Thus, in *City of New Orleans v. Dukes*,[208] the Supreme Court upheld a New Orleans ordinance that generally prohibited food sales in the French Quarter by pushcart vendors, but exempted in a grandfather provision all such vendors who had operated in the Quarter for at least eight years. The court held that the preference for pushcart vendors of some longevity was a reasonable way of preserving the historic Quarter's charm (and identity as a tourist attraction). The parallel between the New Orleans ordinance and a legislative preference for pre-existing farm uses over more intensive, later uses of land is clear. In both instances, one group is preferred over another on the basis of its being "first in time" in establishing itself in the particular area.[209]

Similarly, approval of differentiation between agriculture and other industries is not without precedent. In *Tigner v. Texas*,[210] the Supreme Court upheld a Texas statute exempting agricultural operations from criminal penalties for antitrust activities, stating that the statute and others like it "are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers."[211]

Under this statute it is obvious that a person whose use and enjoyment of his property is interfered with by agricultural odors is treated differently from someone who is similarly assaulted by smells from an oil refinery; in the latter case, but not in the former, the suffering landowner can receive relief through a nuisance action. Nevertheless, the differentiation between the two citizens is a reasonable way to protect the agricultural sector of the state's economy,

207. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

208. 427 U.S. 297 (1976).

209. Priority of use is not a prerequisite for a finding that the legislature has acted reasonably in preferring one economic group over another. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding a Kansas statute prohibiting all non-lawyers from engaging in the business of debt adjusting). Thus, a statute like MICH. CODE ANN. § 286.471-74 (Supp. 1982-83), which does not require priority as a prerequisite to the agricultural operator's receipt of protection under the statute, is not invalid for that reason. It is reasonable for a legislature to decide that the continued availability of farmland will be best assured by the protection of all agricultural operations, even those begun after conflicting uses.

210. 310 U.S. 141 (1940).

211. *Id.* at 147. *See also* Stephens v. Raleigh County Bd. of Educ., 257 S.E.2d 175 (1979).

and therefore no violation of the constitutional requirement of equal protection has occurred.

2. *Limitations Imposed by the Takings Clause*

The two limitations on the police power discussed above, due process and equal protection, are applied to all statutes, whether or not the statute involves a potential deprivation of property. It is the third limitation, the fifth amendment takings clause, which prompted the Court in *Penn Central Transportation Co. v. City of New York* to admit that:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated . . . .[212]

After making this admission, the Court indicated that even though each case would be analyzed in terms of its particular circumstances, a series of identifiable factors structure the analysis.

a. *The Impact of the Character of the Governmental Action*

One such factor identified by the Court in *Penn Central* was the "character of governmental action" in question.[213] When the action constitutes actual physical invasion or occupation of property, the owner's damage is compensable[214] (in fact, in the nineteenth century such an invasion was the only sort of governmental action, other than explicit expropriation, that would trigger a compensable taking).[215] The continued validity of this test was recently affirmed in *Loretto v. Teleprompter Manhatten CATV Corp.*,[216] where the Court found that a statute requiring plaintiffs to allow the installation of cable television equipment on their property was a taking. In a

212. 438 U.S. 104, 123-24 (1978).

213. *Id.*; *see* Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3171 (1982).

214. Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982) (holding that installation of "crossover" and "noncrossover" cable facilities on plaintiff's property was a taking by physical intrusion). *See generally* F. BOSSELMAN, D. COLLIS & J. BANTA, THE TAKING ISSUE 51 (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 170-72 (1974); Dunham, *supra* note 203, at 82; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 600-01 (1972).

215. Michelman, *supra* note 214, at 1184.

216. 102 S. Ct. 3164 (1982).

strongly worded opinion, the Court stated that when the intrusion is a permanent physical occupation of even a small portion of the property, that fact "not only is an important factor in resolving whether the action works a taking but is determinative."[217]

This relatively simple test raises no problem for right-to-farm statutes since by their own terms they do not provide the farmer with any defense to actions brought in trespass.[218] Even though a remedy in nuisance may be barred under the statute, a remedy for any physical invasion is still available to a potential plaintiff under the trespass laws. In evaluating regulations that did not involve physical invasions, the courts have developed a supplemental test which has been termed the "noxious use theory."[219] Under this theory, when the regulation merely restrains a landowner from engaging in activities that are harmful to others, as opposed to requiring him to perform a positive benefit to the public, no compensation is required.[220] According to this approach, a brickyard that was surrounded by residences after it began operation can be prohibited as offensive to health without compensation.[221] Similarly, prohibitions against already existing liquor manufacturing plants,[222] chemical works,[223] and sand and gravel pits[224] have been upheld. In several instances, when the purpose of the regulation was to provide a benefit, such as environmental protection, rather than to terminate a harm occurring on the property, the regulation has been found invalid under this theory.[225]

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217. *Id.* at 3171. Although the installation of the television equipment in *Loretto* was done by a private cable television company, the state's action in the passage of the statute triggered the fifth amendment prohibition. Similarly, the passage of a right-to-farm act is state action if it otherwise meets the tests discussed here, see text accompanying notes 218-31, and as such may violate the takings clause.

218. *See supra* note 62.

219. *E.g.* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48 (1964).

220. Berger, *supra* note 214, at 172-75; *see* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958); Michelman, *supra* note 214 at 1190-93; Plater, *"The Takings Issue in a National Setting: Floodlines and the Police Power"*, 52 TEX. L. REV. 201, 237-38 (1974).

221. 239 U.S. 394 (1915).

222. Mugler v. Kansas, 123 U.S. 623 (1887).

223. Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

224. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

225. State v. Johnson, 265 A.2d 711 (Me. 1970) (invalidating regulation prohibiting filling of wetlands); Morris County Land Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *But see* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (upholding a prohibition against filling a wetland, thereby preventing harmful change in the natural character of the property).

The problems[226] with this approach are typified by the situation in *Miller v. Schoene*.[227] In that case a Virginia statute requiring the destruction, without compensation, of all cedar trees infested with a pest, which did not harm the cedars, but which was deadly to nearby apple trees, was upheld. Although the conflict between the two uses was unquestionable, the finding that the cedars, and not the apples, were the nuisance is not logically required.[228] This problem of incompatibility of uses goes to the heart of any evaluation of the right-to-farm statutes, for in these statutes the legislature has made a policy judgment precisely the opposite of those made in *Hadacheck* and *Miller*. An activity that, by traditional nuisance standards, is harmful or noxious is preferred, under these statutes, to the "innocent" neighboring activity. In effect, the legislature has determined that the incompatible use, which intrudes on a defendant's existing activity, as in *Hadacheck*, should not be allowed to preempt the farmer's prior use claim to the locality. Thus, a plaintiff's cause of action in nuisance against a defendant is, in itself, harmful to society's best interest and therefore not protected.

The limitations placed on the balancing of incompatible uses by value-laden terms such as "noxious," and by discussions of "harm and benefit" are avoided in the "enterprise/arbitration" approach proposed by Professor Sax. His approach recognizes that the government often must, as in *Miller v. Schoene*, act as a mediator between incompatible uses of land.[229] As this mediation is inherent in the act of governing, it is not compensable regardless of the noxious character of either use. Such situations are contrasted with those wherein the government (as an enterprise or corporate entity) appropriates to itself a resource held by an individual and thereby commits an act which should be compensable.[230]

Neither in its pure form, nor in the more sophisticated enterprise/arbitration aspects, does this test support a finding that the right-to-farm acts inflict a taking on owners of neighboring proper-

226. The noxious use of the harm/benefit test has been soundly criticized by the commentators, primarily for failing to take into account the reciprocal nature of the harm, *i.e.*, that it oversimplifies the decision of what activities are good or bad. *E.g.*, Berger, *supra* note 214, at 174; Michelman, *supra* note 214, at 1197-1201; Sax, *supra* note 228, at 49-50.

227. 276 U.S. 272 (1928).

228. *See* Michelman, *supra* note 214, at 1198.

229. Sax, *supra* note 219, at 62. Professor Sax later revised his theory of takings in Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

230. *Id.* at 63.

ties. Under either approach it is within the authority of the state to choose between incompatible uses of land. "When forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which in the judgment of the legislature, is of greater value to the public."[231] Although the existence of a noxious or harmful use may provide added support to the reasonableness of the state's decision to preserve one type of property over another, it is not necessary to support a finding that the affected party need not be compensated for any loss. Thus, a government's policy decision that pre-existing agricultural uses should be preserved, even when they directly conflict with other innocent uses, should not trigger the finding of a taking.

b. The Importance of the Regulation's Economic Impact on the Property

The second major test under the takings clause is whether the governmental regulation places an undue burden upon the individual property owner.[232] The focus of analysis is often the "diminution in value" test found in the opinion of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[233] If the diminution of value attributable to the regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain to sustain the act . . ."[234] and "if regulation goes too far it will be recognized as a taking."[235] Although the degree of imposition is obviously an important factor in determining whether the property owner should be compensated, this test does not produce predictable results.[236] Some courts have been willing to uphold regulations that inflict losses of a very high proportion of the property's value, while in other cases smaller overall reductions have been invalidated.[237] This variation reflects the fact that the decision as to

231. Miller v. Schoene, 276 U.S. 272, 279 (1928).

232. The Court in Lawton v. Steele, 152 U.S. 133, 137 (1894), stated that to be valid a regulation must not be "unduly oppressive upon individuals."

233. 260 U.S. 393 (1922).

234. *Id.* at 413.

235. *Id.* at 415.

236. Michelman, *supra* note 214, at 1191.

237. Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (75% diminution in value—no compensation; Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% decrease—no compensation)); *see generally* Penn. Central, 438 U.S. at 131; 1 R. Anderson American Law of Zoning § 82.23 at 101 (1968).

whether the regulation's impact is too great is structured by a number of preliminary determinations about the nature of the property and how that property is to be evaluated. Any analysis of the right-to-farm laws, therefore, must begin with a delineation of the property right that the potential plaintiff is losing.

The term "property" as used in the fifth amendment refers to the entire "group of rights inhering in the citizen's [ownership]."[238] This group, or "bundle" is made up of a number of individual "strands,"[239] such as the rights to possess, to use and to dispose of the property.[240] The strand or right lost by a potential plaintiff under right-to-farm acts is the right to a cause of action against a defendant agricultural operation for interference with the use and enjoyment of his property.

The question raised by the abrogation of this right, whether a legislature can authorize a nuisance, has bedeviled the courts in a number of contexts.[241] Where the nuisance in question is a public nuisance, the issue is most easily resolved. A legislative decision to authorize an activity which would otherwise be a public nuisance reflects a policy determination that the benefits of the activity outweigh the burdens it imposes on the public as a whole, and as such it is entitled to judicial deference.[242]

By contrast, the legalization of a private nuisance (and the consequential interference with private property rights), is limited by the strictures of the takings clause.[243] Although some courts have

238. United States v. General Motors Corp., 323 U.S. 373 (1945). The term is not used, therefore, in the "vulgar and untechnical sense of the physical thing . . . . [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . ." *Id.* at 377-78; *see* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 n.6 (1980).

239. Andrus v. Allard, 444 U.S. 51, 65-66 (1979); *see also*, Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3176 (1982).

240. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

241. *See generally* Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781 (1952); Note, *Nuisance-Injunction-Defense of Statutory Authorization of Location*, 25 TEX. L. REV. 96 (1946).

242. Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914); C.E.E.E.D. v. California Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 324, 43 Cal. App. 3d 306, 318 (1974); Brown v. Bigelow, 30 Haw. 132, 135 (1927); Borough of Collegeville v. Philadelphia Suburban Water Co., 377 Pa. 636, 655, 105 A.2d 722, 731 (1954); all *contra* Pettis v. Johnson, 56 Ind. 139, 148 (1877) and state *ex rel.* Helsel v. Board of County Comm'rs of Cuyahoga County, 37 Ohio Op. 58, 79 N.E.2d 698, 707 (1947).

243. Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914) stated: "[The legislature] may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use." The Court in *Richards* noted that English

held as a general principle that a legislature cannot authorize a use constituting a private nuisance,[244] most find that, if the law is not unreasonable (under the due process constraints discussed above) the authorization of the nuisance is valid.[245] Such a privilege is not lightly conferred, however, and the mere granting of a license to engage in the activity in question alone is often not sufficient.[246] Rather, the legislature must expressly designate the challenged activity as a protected one.[247]

A second, more fundamental limitation imposed upon a defendant wishing to raise the legislative authorization defense is that the activity must not be inappropriate or unreasonable. (In one sense this is a corollary of the express authorization requirement, in that any such authorization is "accompanied by an implied qualification" that it entails no unreasonable interference with private rights.)[248] Thus, a properly licensed hospital,[249] a baseball park,[250] an airport[251] and a sewage treatment plant,[252] may only be found

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cases holding that there is no limitation on Parliament's right to authorize a private nuisance are distinguishable because Parliament is "omnipotent" and, unlike American legislative bodies, unrestrained by the fifth amendment. *Id.* at 552-53.

244. *E.g.*, G.L. Webster Co. v. Steelman, 172 Va. 342, 358, 1 S.E.2d 305, 311 (1939) (cannot authorize acts which "unreasonably interfere with and disturb the rights of others in their property"); People v. City of Reedley, 66 Cal. App. 409, 413, 226 P. 408, 409 (1924) (power of the court to abate nuisances cannot be limited except by constitutional amendments); Blanc v. Murray, 36 La. Ann. 162, 164 (1884) (municipal body cannot authorize a use which will create a private nuisance).

245. Sawyer v. Davis, 136 Mass. 239 (1884) (upholding the validity of city ordinance authorizing the ringing of a starting bell in a manufacturing plant).

246. Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914); Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883) (authority granted to construct housing for locomotives did not authorize location near a church); Price v. Grose, 78 Ind. App. 62, 133 N.E. 30 (1921); Morton v. City of New York, 140 N.Y. 207, 35 N.E. 490 (1893) (authorization to lay water pipes no defense to nuisance resulting from location of pumping station).

247. Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W.2d 517, 521 (1946) (approval by state agency of storage tanks for butane a defense although no explicit approval of location). *See* Note, *Nuisance—Injunction—Defense of Statutory Authorization of Location*, 25 TEX. L. REV. 96 (1946); Strachan v. Beacon Oil Co., 251 Mass. 479, 146 N.E. 787, 790 (1925) (if terms of license are complied with, oil refinery cannot be a nuisance); Murtha v. Lovewell, 166 Mass. 391, 44 N.E. 347, 348 (1896) (license of iron foundry a defense because "the legislature intended the license to cover the whole question").

248. Richards v. Washington Terminal Co., 233 U.S. 546, 556 (1914).

249. Prest v. Ross, 245 Mass. 342, 139 N.E. 792, 793-94, (1923) (sights, sounds and smells are consistent with the operation of a well-regulated hospital).

250. Warren v. Dickson, 185 Ga. 481, 195 S.E. 568, 570 (1938) (baseball park activity would be a nuisance if unreasonably conducted).

251. Elder v. City of Winder, 201 Ga. 511, 40 S.E.2d 659, 661 (1946) (airport is lawful unless constructed in a negligent manner).

nuisances if they are operated unreasonably.

The issue of appropriateness has risen repeatedly where location in a proper zone is raised as a defense to a nuisance action.[253] As discussed above,[254] the decision that an activity is unreasonable is determined to a great extent by the locality in which the activity occurs. Thus, compliance with local zoning ordinances is properly at least one factor[255] considered in determining whether a defendant's activities place an unreasonable burden on a plaintiff's use of property. Even where the zoning ordinance is recognized as *prima facie* evidence of the reasonableness of defendant's action, this evidence may be defeated by a showing that defendant in fact operated the business negligently and unreasonably.[256] In effect, the statute in question authorizes the defendant to conduct business, but not to do so in an unreasonable or negligent manner.

The remaining question is what actions are reasonable in an activity operating pursuant to legislative authorization, that is, what duty is owed to the plaintiff? The answer seems to be that while actions inherent in the lawful business are protected, the defendant is under a duty to take all reasonable steps to avoid harm to the plaintiff.[257] This rule was articulated by a 1935 California statute

252. State v. Collingswood Sewerage Co., 85 N.J. 567, 89 A. 525, 526-27 (1914) (legislative authorization is no excuse where plant was faultily constructed).

253. *See generally* Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457 (1941); Comment, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749 (1961); Comment, *The Effect of Zoning Ordinances on the Law of Nuisances*, 54 MICH. L. REV. 266 (1955).

254. *See supra* text accompanying note 75.

255. Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695, 698 (1961) (zoning as industrial district cannot authorize a nuisance); Rockenbach v. Apostle, 330 Mich. 338, 47 N.W.2d 636, 639 (1951) (zoning is evidence of the character of the district); Scallet v. Stock, 363 Mo. 721, 253 S.W.2d 143, 146 (1952) (fact mortuary is in a proper zone no defense, but the defendant wins because of character of locality); Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484, 485 (1927) (location in proper zone no defense).

256. Kirk v. Mabis, 215 Iowa 769, 246 N.W. 759, 762 (1933) (funeral home operated in a proper manner); Jedneak v. Minneapolis Gen. Electric Co., 212 Minn. 226, 4 N.W.2d 326, 329 (1942) (zoning alone does not justify, but reasonableness of interference determined by industrial nature of the area); Michelsen v. Leskowicz, 55 N.Y.S.2d 831, 836 (1945) (duck farm operation is "reasonably carried on"); Bove v. Donner-Hanna Coke Corp., 236 N.Y. App. Div. 37, 258 N.Y.S. 229, 234 (1932) (zone has been allocated for industrial purposes and the plaintiff cannot expect advantages of a residential area); Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976, 977 (1922) (activity not conducted in "negligent and improper manner").

257. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others.

Sawyer v. Davis, 136 Mass. 239, 242 (1884); *see also* Patterson v. Peabody Coal Co., 3 Ill. App. 2d

which provided that proper zoning was a defense to certain nuisance actions and which also stated "nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation."[258] In interpreting this statute, the courts have concluded that in addition to showing that the defendant failed to meet the standard of the industry, the plaintiff can meet his/her burden by showing that defendant has failed to use devices or techniques of reasonable expense which would lessen the plaintiff's injury.[259]

This focus on normal operation of a business as a prerequisite for valid legislative authorization is exemplified by *Richards v. Washington Terminal Company*.[260] In *Richards*, the owner of property located near the mouth of a railroad tunnel that was authorized to be constructed by Congress sued the railroad owners for compensation for damage to his property from smoke and fumes generated in the tunnel. These gases were removed by a fanning system which had its outlet in close proximity to plaintiff's property. The Supreme Court found that the legal authorization was a defense to any action for damages resulting from the ordinary operation of the railroad,[261] but it was not a defense to actions for damages suffered disproportionately by the plaintiff as a result of this fan system. The Court suggested that, if possible, the problem should be remedied

311, 122 N.E.2d 48 (1954) (defendant must operate as carefully as possible); Jedneak v. Minneapolis General Electric Co., 212 Minn. 226, 4 N.W.2d 326 (1942).

258. CAL. CIV. PROC. CODE § 731a (West 1980). The statute reads in full:

> Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport or any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants' refineries and other similar establishments whose operations produce offensive odors.

See Note, 9 SO. CAL. L. REV. 365 (1936). Although the California courts have upheld this statute, Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955) (ginning mill in proper zone could not be abated as a nuisance), they have limited its application to barring a remedy by way of injunction (but not damages); Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350, 359 (1971).

259. Venuto v. Owen-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350, 360 (1971); Gelfand v. O'Haver, 33 Cal. 2d 218, 220-21, 200 P.2d 790, 791-92 (1948).

260. 233 U.S. 546 (1914).

261. *Id.* at 556.

by installing ventilation shafts throughout the length of the tunnel so that all the fumes did not surface at a single point. If the fumes could not be diffused, then the burden on the plaintiff would be beyond that expected from the normal operation of the railroad, and compensation must be paid.[262]

The Court in *Richards* did not supply any more explicit explanation of the elements necessary to trigger a finding that a statute works a taking. It seems clear, however, that the analysis required for evaluating a statute changing nuisance rules is the same as that used for any other statute. Thus, the fact that the plaintiff's loss resulted from his inability to abate a nearby nuisance, rather than from a zoning ordinance prohibiting development or another direct limitation on the use of his property, does not appreciably change the nature of the Court's decision as to whether the impact of the regulation imposes an undue burden on the plaintiff. In the words of Mr. Justice Holmes:

> [W]ithin constitutional limits not exactly determined the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property.[263]

These limits (set by the fifth amendment) are embodied in the kaleidoscope of tests applied in the takings context. In effect, therefore, the legislature may effectively authorize a nuisance, but that authorization will be subject to the same strictures as any other legislative action.

This conclusion is consistent with other cases where the Supreme Court has upheld a statutory defense that had the effect of depriving the plaintiff of a cause of action. Examples of these permitted modifications of common law causes of action include: statutory grants of immunity to parole officers for negligence,[264] guest passenger statutes[265] and worker's compensation laws.[266] In fact, the

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262. *Id.* at 557.

263. Commonwealth v. Parks, 155 Mass. 531, 30 N.E. 174 (1892).

264. *See* Martinez v. California, 444 U.S. 277, 281-82, *reh'g denied*, 445 U.S. 920 (1980) (challenge made under the takings clause).

265. Silver v. Silver, 280 U.S. 117 (1929) (challenge made under the equal protection clause). The Constitution does not prohibit the "creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Id.* at 122.

266. New York Cent. R.R. Co. v. White, 243 U.S. 188 (1916). *See generally* Humbach, *supra* note 199, at 282 for other examples of acts of "deregulation" which are not compensable.

power of the legislature to modify common law rights is a crucial tool in the continued vitality of the common law.[267] Without such a tool there is a great danger that the system will become rigid, unable to respond to changes in society.[268]

The recognized importance of maintaining flexibility in the system supports the notion that when the government by changing the common law is merely "adjust[ing] the benefits and burdens of economic life to promote the common good,"[269] it is acting in its arbitral, not its enterprise role, and therefore compensation is not required.[270] It seems clear that when the government appropriates a plaintiff's property rights to itself as a corporate entity (just as when it physically invades a plaintiff's property), compensation should be required.[271] The lack of such an appropriation is not a determination on the question of whether a taking has occurred, but a strong factor weighing against such a finding.[272] The fact that a right-to-farm law is merely an adjustment of the state's tort system, then, counterbalances other factors weighed by the court, including the economic loss to a plaintiff resulting from the statute.

Although the abrogation of a common law cause of action could be a taking if the burden placed on a plaintiff was an undue one, the cause of action is only one strand of the total bundle of

267. Munn v. Illinois, 94 U.S. 113 (1876) ("[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.* at 134.)

268. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (the right to exclude not so essential to property value as to constitute a taking). Justice Marshall, in his concurring opinion, focused more directly on the modification of common law aspect of the case, *id.* at 92-94, stating that to prohibit any modification "[w]ould freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance." *Id.* at 93. Nevertheless, such changes may not go too far in intruding on the "sphere of private autonomy which government is bound to respect." *Id.* (citations omitted).

269. Penn. Central Trans. Co. v. New York City, 438 U.S. 104, 124. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (holding in applying this test that the statute was "not merely" such an adjustment when it authorized state courts to retain interest accrued on money deposited with them. 449 U.S. at 163).

270. Sax, *supra* note 219, at 61-64. *See also* Humbach, *supra* note 199, at 286, for an argument that when a government is acting in its corporate capacity to acquire property rights for public use, a plaintiff must be compensated under the just compensation clause, but that no such limitation accrues where such appropriation is lacking. In effect, where there is no appropriation of a right, even though rights are redistributed between private parties, the only limitation on the government's police power is found in the due process clause, which requires that the regulation be a reasonable means to a legitimate public purpose.

271. *Penn. Central*, 438 U.S. at 128.

272. *Id.* at 124.

rights in the property, and the allegation of undue burden must be evaluated considering the property as a whole.[273] Thus, in *Penn Central*, the Court found that although the restrictions imposed by historic designation resulted in a substantial loss in the value of air rights over Grand Central Station, the restrictions did not sufficiently diminish the value of the property as a whole to constitute a taking.[274] The unwillingness of the Court to allow the segmentation of various aspects of property value is arguably intrinsic to Justice Holmes's original articulation of the diminution-in-value theory, that a coal company's right to compensation for a prohibition against the exercise of its mineral rights was a total deprivation of value only because the company had no claim to the surface of the land.[275] Similarly, in order for a neighboring property owner to demonstrate that he/she has been subjected to a taking by the defendant's interposition of the defense of the right-to-farm act, the plaintiff must show that the inability to secure a remedy for the nuisance diminished the value of his/her property *as a whole* so completely that a taking has resulted. If odors from the neighboring farmer's cow barns make the patio less pleasant on summer evenings, the inability to enjoin the farm may completely destroy a cause of action in nuisance, but it has a relatively small impact on his/her enjoyment of (and the value of) the property as a whole.

The final fact relevant to an evaluation of the severity of the economic impact of a statute under the takings clause is whether the regulation interferes with a plaintiff's "distinct investment backed expectations;"[276] that is, has plaintiff reasonably relied to his financial detriment on his expectation that the property in question could be used in a manner prevented by the regulation. Expectations can be unreasonable because a person has no legal interest in the economic benefit being denied[277] or because the expected use of

273. *Id.*

274. *Id.* at 130.

275. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) ("[The statute] purports to abolish what is recognized in Pennsylvania as an estate in land,—a very valuable estate . . . ." *Id.* at 414). *See* Michelman, *supra* note 214, at 1230. *See also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1979) ("[A]ppellants have failed to demonstrate that the right to exclude others is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.' "); Andrus v. Allard, 444 U.S. 51 (1979) (prohibition of right to sell eagles was not a taking).

276. *Penn. Central*, 438 U.S. at 124.

277. *Id.* at 125 (citing examples of economic benefits that do not constitute property interests). *See* Sax, *supra* note 219, at 61-62.

the parcel is not reasonable.

In *Penn Central*, the Court was faced with a situation remarkably similar to that faced by a plaintiff who has "come to" an agricultural operation by developing nearby land. Such a plaintiff, like the Penn Central Transportation Company, expects not a continuation of the *status quo*, but a radical change from current usage of the property. The *Penn Central* Court indicated that the company's "primary expectation concerning the use of the parcel"[278] had to be viewed as a continuation of the *status quo* in existence for sixty-five years: a railroad terminal with office space and concessions. By implication, the contemplated use of the air space over the terminal for a massive office building was not a reasonable one on which the company should have relied for investment purposes. Similarly, a person building a residence near an agricultural operation may reasonably expect that the government will not change zoning to allow a cement factory next door,[279] but at the same time the residence owner should not expect to be able to use the judicial arm of the state to force a change in the existing neighbor's agricultural use. Since such an expectation would not be reasonable, interference with it does not unduly burden the landowner's property to the extent that it has been "taken."[280]

A review of the factors relevant to a court determination of whether a right-to-farm statute places an undue economic burden on a potential plaintiff indicates that in most instances the statute does not result in a taking. A plaintiff's right to a cause of action in nuisance is but one aspect of the total bundle of property rights; any evaluation of the extent of a plaintiff's loss must be based upon the value of the property as a whole, not just one segment. In addition, the state passing the right-to-farm law has not in any sense acquired for itself the right to use a plaintiff's property, it has merely acted as an arbiter between two classes of its citizens. Finally, in most instances, a plaintiff's commencement of a use incompatible with agriculture, while in close proximity to a farm or other agricultural

278. *Penn. Central*, 438 U.S. at 136.

279. A person has been recognized as having a property interest in the reasonable expectation that a neighborhood will retain its character. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Burns v. City of Des Peres, 534 F.2d 103, 110 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976).

280. *Accord* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761, 770 (1972) ("[T]oo much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the right of the public."). *See* Michelman, *supra* note 214, at 1239-40, for a discussion of the relation of speculation value to a party's expectations for his property.

operation, is not consistent with reasonable expectations for use of the property. In a few instances, either due to a flaw in the drafting of the particular statute, or due to a peculiarity of the individual factual pattern, a right-to-farm statute may work a taking because of its extreme and unusual impact upon the property. Generally, however, these statutes meet the standards imposed on government actions by the United States Constitution.

V. CONCLUSION

In the last decade the preservation of farmland has been accepted as a legitimate governmental goal. One answer to reaching that goal is embodied in the right-to-farm laws. When evaluated against the due process and just compensation clauses of the fifth amendment, under any of the various theories utilized by the courts, the statutes stand up as valid exercises of the police power.

A final question remains to be addressed: despite its constitutional soundness, does the statute produce unfair[281] results? This query can be analyzed most easily by identifying the classes of individuals who are likely to be potential plaintiffs in nuisance actions against an agricultural operation. The first identifiable class consists of other farmers who may be operating in the area. These neighboring farmers receive a reciprocal benefit from the statute which in most instances mitigates any perceived unfairness. The second group of potential plaintiffs is comprised of those individuals who purchase plots (often five to ten acres) in a rural area, motivated either by the desire to enjoy the amenities of a rural environment, or by the benefit of land prices which are lower than those found in more congested settings. Those plaintiffs provide the paradigmatic example of persons who, having appropriated the benefits of an agricultural area, can reasonably be found to have assumed the risk[282] of its nuisances as well.

The two remaining categories of potential plaintiffs are exemplified in the case of *Spur Industries, Inc. v. Del E. Webb Development Co.*[283] In that case, the defendant feedlot operator, Spur,

281. *See* Michelman, *supra* note 214, for a broad discussion of the concept of fairness. Michelman, adapting a fundamental principle of John Rawls to the compensation question, suggests that imposing a loss on an individual is not unfair, if that person should be able to see that refusing to compensate people in his situation will, in the long run, benefit people like him. *Id.* at 1223. *See also* Ellickson, *supra* note 94, at 691 n.30.

282. *See supra* text accompanying note 102.

283. 108 Ariz. 178, 494 P.2d 700 (1972).

began operation in an area far removed from development. Several years later a developer, Del Webb, began a massive residential community which developed in the direction of the feedlot operation.

Del Webb soon found it difficult to sell residences on its property in the vicinity of the feedlot and filed suit to enjoin the feedlot operation. The Arizona Supreme Court held that Del Webb was entitled to an injunction against Spur, despite the fact that it had come to the nuisance. This victory turned out to be a pyrrhic one for the developer, because the court also concluded that Del Webb, "[h]aving brought people to the nuisance to the foreseeable detriment of Spur"[284] should be required to indemnify Spur for the costs of moving or shutting down.[285] If Arizona had had a right-to-farm law at the time this suit was litigated, both Del Webb and the people to whom it had sold property would be potential plaintiffs left without remedy against Spur due to the statute. This result would not create any inherent unfairness as to Del Webb because it surely can be seen to have assumed the risk in that it took "advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build."[286] It is more difficult to assign a knowing risk-taking to the individual purchaser of a residence within the subdivision. It can be argued that purchasers who have little experience with the less attractive aspects of agriculture lack the notice[287] upon which an assumption of risk argument rests. The harshness of excluding any remedy for this class of plaintiff can be mitigated, however, not by charging the farmer, who is operating appropriately under the statute, or the state, which is reasonably pursuing a legitimate land use policy, but by allowing recovery from the builder-vendor of the property who selected the location as the site for residential development.

The mechanism for such a remedy already exists in the approximately thirty states that imply a warranty by a residential builder-vendor to the initial purchaser that the property is habitable.[288] This warranty, which protects a buyer against a variety of defects,[289]

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284. *Id.* at 186, 494 P.2d at 708.

285. *Id.*

286. *Id.*

287. Common sense may dictate the existence of inquiry notice on the plaintiff's part, at least in situtions when the risk is a feedlot operation.

288. Note, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607, n.5 (1980).

289. *See* Annot., 18 A.L.R. 4th 1168 (1982); Annot., 25 A.L.R.3d 383 (1969).

is based upon a recognition of both the inequality of expertise,[290] which is generally present between a builder and a purchaser, and the difficulty of identifying by inspection all possible defects.[291] Those statutes also reflect recognition of the fact that a builder is initially in a better position to avoid any potential defects.[292]

The imposition of liability upon a builder-vendor, not merely for the soundness of a structure, but for the appropriateness of the building site, has ample precedent. Such developers have been held liable for negligent construction on filled or otherwise unstable land,[293] for damage from improper drainage,[294] for failure to conduct soil bearing tests before building a home on a lake front lot[295] and for damage resulting from erosion[296] and landslides.[297] The location of residences in inappropriate proximity to agriculture, resulting in substantial interference with a home owner's enjoyment of his property, should create an analogous liability on the part of the vendor.

In a factual pattern like that in *Spur*, to the extent that the purchasers themselves cannot be reasonably said to have assumed the risk of their rural location due to lack of adequate notice, the defect (of proximity to a nuisance) is by definition latent, and, as such, is an appropriate object of such a warranty. The application of a warranty of habitability to this situation admittedly will not provide a complete solution because a minority of jurisdictions have not yet adopted the concept at all, and a far greater number have not recognized its application to subsequent purchasers.[298] Nevertheless, this approach provides a means of directing attention to a solution that burdens the party who initially could have prevented the problem.

Right-to-farm statutes, in their many incarnations, have not yet

290. McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979).

291. *Id.* at 1292. *See also*, Note, *The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, 2 RUT.-CAM. L.J. 120, 137 (1970).

292. McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979); House v. Thornton, 76 Wash. 2d 429, 457 P.2d 199, 204 (1969).

293. Conolley v. Bull, 285 Cal. App. 2d 183, 65 Cal. Rptr. 689 (1968); Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). *See also* 80 A.L.R.2d 1453 (1961).

294. McFeeters v. Renollet, 210 Kan. 158, 500 P.2d 47 (1972).

295. Baranowski v. Strating, 72 Mich. App. 548, 250 N.W.2d 744 (1976).

296. Groening v. Opsata, 323 Mich. 73, 34 N.W.2d 560 (1948); Beri, Inc. v. Salishan Properties Inc., 282 Or. 569, 580 P.2d 173 (1978).

297. ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

298. *See* Note, *supra* note 288.

received the legal substance that comes from being applied by the courts to concrete factual situations. Consequently, their effectiveness and even their very validity remain open to challenge. Nevertheless, they reflect a judgment by a large number of legislative bodies that the traditional preference for development over a less intensive use of land (in the balancing process inherent in nuisance cases), should be reversed in order to ensure the availability of agricultural land for future generations.